Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-690

BOBBY REED MAGBY,

Petitioner,

v. John Moran, Dir, Ariz. St. Dept. of Corrections et al

~~UNITED STATES OF AMERICA~~,

Respondent.

PETITION FOR

WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOBBY REED MAGBY,
Petitioner

[illegible]
[illegible]
Tucson, Arizona 8570[illegible]
Attorney for Petitioner

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STANTON BLOOM
32 N. Stone, Suite 610
Tucson, Arizona 85701
Attorney for Petitioner

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REFERENCE TO REPORT OF OPINION

Petitioner, BOBBY REED MAGBY, requests that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Ninth Circuit, San Francisco, California (Docket No. 78-1700) dated August 6, 1979 and the Judgment and Order of the District Court of Arizona, Phoenix, Arizona (Docket No. CIV 77-744) dated January 3, 1978 and the Judgment and Order of the Arizona Supreme Court, Phoenix, Arizona cited as State v. Magby, 113 Ariz. 345, 554 P.2d 1272 (1976).

The opinion of the Arizona Supreme Court is attached as Appendix A and is reported as State v. Magby, 113 Ariz. 345, 554 P.2d 1272 (1976). Further, the opinion of the District Court of Arizona by Memorandum issued on January 3, 1978, No. CIV 77-744 Phx (WPC) is attached as Appendix B. In addition, the Memorandum Opinion No. 78-1700 of the 9th Circuit Court of Appeals rendered August 6, 1979 is attached as Appendix C and the Order denying the Petition for Rehearing is attached as Appendix D.

STATE OF JURISDICTIONAL GROUNDS

The Arizona Supreme Court affirmed the Petitioner's conviction for first-degree murder on July 20, 1976. On October 13, 1976, the Arizona

Supreme Court denied Petitioner's Motion for Rehearing. Petitioner's Writ of Habeas Corpus was denied by the District Court of Arizona on January 3, 1978. On January 31, 1978, the District of Arizona issued a Certificate of Probable Cause pursuant to 28 U.S.C. §2253. Petitioner's appeal to the Ninth Circuit Court of Appeals was denied on August 6, 1979 (Appendix C). Petitioner's Motion for Rehearing before the Ninth Circuit Court of Appeals was denied on September 13, 1979 (Appendix D). Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1)(2) and 1254(2)(3). Jurisdiction is further based on Rule 19(1)(b), Supreme Court Rules because the United States Court of Appeals, District Court of Arizona and the Arizona Supreme Court "have decided federal questions in a way in conflict with applicable decisions of this Court."

QUESTIONS PRESENTED FOR REVIEW

ARGUMENT I

DID THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERR IN DECIDING THAT A PETITIONER'S IN-CUSTODY STATEMENTS MADE TO A PROBATION OFFICER WITHOUT MIRANDA WARNINGS WERE HARMLESS ERROR, AND THEREBY DEPRIVE THE PETITIONER OF DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH

AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVE PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT II

DID THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERR IN DECIDING THAT PETITIONER'S STATEMENTS TO PSYCHIATRISTS IN VIOLATION OF THE ARIZONA RULES OF CRIMINAL PROCEDURE WERE HARMLESS ERROR, AND THEREBY DEPRIVE PETITIONER OF DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVE PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF IN ACCORDANCE WITH THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT III

DID THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERR IN DECIDING THAT A PSYCHIATRIST APPOINTED TO EXAMINE PETITIONER SOLELY FOR COMPETENCY COULD TESTIFY AT TRIAL AS TO THE SANITY OF PETITIONER AT THE TIME OF THE OFFENSE, AND THEREBY DEPRIVE

PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT IV

DID THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERR IN DECIDING PETITIONER'S CONFESSIONS AND STATEMENTS TO POLICE OFFICERS AND LAY WITNESSES WERE KNOWINGLY AND VOLUNTARILY MADE, EVEN THOUGH PETITIONER WAS HIGHLY INTOXICATED, AND THEREBY DEPRIVE PETITIONER OF HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

ARGUMENT V

DID THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERR IN DECIDING THE EVIDENCE SUPPORTED CONVICTIONS FOR FIRST AND SECOND-DEGREE MURDER, AND DEPRIVE PETITIONER OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATE PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ARGUMENT VI

DID THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERR IN DECIDING THAT AN INSTRUCTION STATING, "THERE IS NO PRESCRIBED PERIOD OF TIME WHICH MUST ELAPSE BETWEEN THE FORMATION OF THE INTENT TO KILL AND THE ACT OF KILLING" WAS PROPER, AND DEPRIVE THE PETITIONER OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATE HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> "Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part, that:

> "In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law;..."

[The following abbreviations shall be used in the context of this Brief—R-Record Transcript; V-Volume]

STATEMENT OF THE CASE

Petitioner was drinking very heavily for several months prior to December 22, 1973. On that morning he again was drinking to great extreme when he came into contact with the deceased and another man at a junk yard located in a desert-like area. (R-V4-674, 675, 731, 733, 739, 741, 770; R-V6-1095, 1096, 1180).

Petitioner and a friend he was with shared the alcohol with the deceased. Shortly thereafter, a fight ensued and the deceased beat the Petitioner with his hands and feet. (R-V4-666, 724, 725, 727; R-V6-1083, 1084, 1184, 1187; R-V4-702; R-V6-1189). The deceased was a reputed violent ex-felon who was adept with karate. After the drubbing, Petitioner went into his van to tend his wounds. He came out within minutes and approached the deceased with a shotgun in his hands. (R-V6-1124). The deceased came towards the Petitioner and the Petitioner fired the weapon and killed the

deceased. The Petitioner fled the scene and ran a short distance to a truck and went inside and passed out until the police found him in this condition several hours later. The Petitioner was transported to the local hospital for treatment of his wounds and his intoxication. He was then taken to the local police station for questioning. The Petitioner's blood was taken some five (5) hours after the shooting and produced a reading of .28. Testimony from the State's expert revealed that the Petitioner's intoxicated state at the time of the shooting was somewhere between .36 and .40. (R-V9-1637).

Almost everyone who came into contact with Petitioner that day admitted he was in a very highly intoxicated state at the time of the shooting and when he made statements to the police and to friends (overheard by the police). Petitioner in his previous filings has listed numerous citings of the record demonstrating his incredibly high degree of intoxication. (R-V4-614, 617; R-V4-674, 675, 715, 716, 731, 733, 739, 741; Motion for New Trial, p. 20; R-V6-1095, 1096, 1180, 885, 895; R-V8-1423-54, 1563, 1569, 1575, 1586-87; R-V9-1637, 1609; R-11-19-74, pp. 148-149).

Petitioner at the time of the shooting, was on probation for the misdemeanor offense of obstructing justice. Two days after the shooting, Petitioner's probation officer visited him and took

a full statement from the Petitioner who admitted his guilt to the offense. (R-11-19-74, pp.183-185). The probation officer did not advise Petitioner of his Miranda rights and obtained the statement by virtue of his relationship with the Petitioner. The probation officer then gave the information to the prosecution who, in turn, used the evidence against the Petitioner at trial in the State's case-in-chief.

The Petitioner along with his defenses of intoxication and self-defense, presented the defense of insanity. Pursuant to Arizona law and the explicit prosecutor avowals, the prosecution was prohibited from making inquiry of any examining psychiatrist as to what the Petitioner told him about the facts of the case. The prosecution nevertheless elicited such statements from the psychiatrists. (R-V10-1811; R-V11-1921, 2075).

Further, one of the two psychiatrists who testified for the State was designated by the trial court and the defense to examine the Petitioner for competency only. (R-V3-558-59). The psychiatrist examined the Petitioner for competency only, but was called, over objection, by the prosecution to testify on the issue of insanity.

The trial court then improperly instructed the jury on the issues of first and second-degree murder and also incorrectly informed the jury that,

> "...there is no prescribed period of time which must elapse between the formation of the intent to kill and the act of killing. It does not matter how quickly or slowly these mental processes succeed each other or how quickly they are followed by the act of killing." (R-V12-2148, 2242-43).

In addition, the trial court instructed the jury that,

> "...where it is shown that the homocide has been committed with a deadly weapon and no circumstances in mitigation, justification or excuse appear, you may imply malice." (R-V12-2242).

This instruction clearly shifted the burden of proof to the Petitioner.

The Petitioner did not testify in this case. Petitioner urges a review by way of Writ of Certiorari because the previous opinions are inconsistent with United States Constitutional provisions and recent developments in criminal law.

RAISING OF THE FEDERAL QUESTION

All of the issues were either raised by objection in the trial court in Arizona or raised on appeal and ruled upon by the Arizona Supreme Court as fundamental harmless error. In each argument presented, Petitioner has raised federal constitutional grounds of error and further the

federal question is timely and properly raised after the time for rehearing in the Court of Appeals thereby giving this Court jurisdiction to review the Judgment on Writ of Certiorari. The issues involve situations that occur everyday with probation or parole officers and psychiatrists and there is a real need for this Court to lay down guidelines in these areas. Further, the factual situation in this case cries out for this Court to take some action, particularly when the jury was so misguided by the trial court's jury instructions and more importantly, the improper Arizona law.

PROCEEDINGS IN FEDERAL COURTS

Petitioner filed a Petition for Habeas Corpus which was denied on January 3, 1978. On January 31, 1978, a Certificate of Probable Cause was issued and Petitioner filed his appeal which was denied by Memorandum Opinion of the Ninth Circuit Court of Appeals on August 6, 1979. Petitioner then filed a Motion for Rehearing which was also denied by the Ninth Circuit Court of Appeals on September 13, 1979.

Petitioner, now for the first time, files this Writ of Certiorari.

REASON FOR GRANTING THE WRIT

ARGUMENT I

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT AN APPELLANT'S IN-CUSTODY STATEMENTS MADE TO A PROBATION OFFICER WITHOUT MIRANDA WARNINGS WERE HARMLESS ERROR, AND THEREBY DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVED PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner made a long-detailed statement to his probation officer relating to the event of the shooting. The probation officer did not advise the Petitioner of his Miranda rights, and hence, for purposes of this Writ, all of the Courts deciding the issues presented herein, have held this to be error—albeit harmless error. The Courts previously ruling on the issues have held the error to be harmless because the statements were cumulative to other statements made by the Petitioner presented by the prosecution.

Firstly, the statements referred to by the Courts only indicate that the Petitioner shot a man who was beating on his head. The statements made to the probation officer are as follows:

"John Burch, the probation officer, testified as follows before the jury:

Q. What, if anything did he say at that point?

A. He said, 'Boy, I really done it now...'

Q. And did you start asking him questions at this time?

A. I asked him to tell me if he would what transpired, what happened, why he was there.

Q. And what did he say?

A. He related to me in his own words more or less what happened.

Q. Can you tell us what he said?

A. Yes, we were talking specifically about what had occurred on Saturday, prior to the Monday morning or the 29th when I spoke to him in the jail. This was on Saturday, the 22nd of December, and he stated that he had been drinking and that he had been working up on Mt. Lemmon that he had been drinking up there. He had been with another fellow by the name of Wayne. They had been living out of a van, a truck. They had been disassembling some parts up there, I believe, a boiler,

construction work up there. He stated they had started drinking the day previous, which I assume was Friday. He had been drinking that day that they came down to Tucson, I believe. I can't recall if it was Friday night or Saturday. He met up with this other guy whose name he did not know at the time, that they had been drinking together; they had been drinking out of a gallon jug of wine. They had been sharing it, passing it back and forth. There had been an argument between them; there had been words between each other. He stated he was knocked down several times. He related that he went to the van which he was living out of, went to the back of it, got this gun out of it, came back and shot the individual.

Q. Did he tell you what kind of a gun it was?

A. Yes, he told me it was a shotgun, twelve gauge.

Q. Did you ask him where he had gotten the gun?

A. Yes, I did. He said he had gotten it from a friend in California, several weeks prior.

Q. Did he state the reason that he needed the gun for or had the gun?

Mr. Bloom: Objection, your Honor, materiality.

The Court: Overruled.

The Witness: He states he was going to fix it up and use it to hunt birds with, bird hunting.

By Mr. Kurlander:

Q. And did he say how he was carrying the shotgun prior to the incident?

A. Just in the truck.

Q. Did you ask him as to what he was doing in the particular area, 48th and Randolph, on that day?

A. Yes, the salvage company—

Mr. Bloom: Objection to the materiality, your Honor.

The Court: Overruled.

The Witness: He related to me that the salvage company was several doors down from where the incident occurred, I believe it is Complete Salvage Company.

By Mr. Kurlander:

Q. What, specifically, did he say about the shooting incident itself?

A. Just the fact that he had gone to the truck, gotten the gun, and returned and shot the guy.

.....

Q. Did you ask him as to whether in fact he knocked the deceased down?

A. No, I did not.

Q. Now you further mentioned that he had a hard time remembering what had occurred after the shooting incident. Now, did he ever say that he had a hard time remembering what happened just prior to the shooting incident and during the shooting?

Mr. Bloom: Objection, your Honor, to the form of question.

The Court: Overruled.

Mr. Bloom: As to what he didn't say.

The Court: Overruled.

The Witness: He did not mention that at all, no." (R-11-19-74, 182-185, 210).

These statements are much more detailed and the only statements offered by the prosecution against a non-testifying defendant on the defenses of insanity, intoxication and self-defense. They are

not merely tepid as stated by the Ninth Circuit Court, but truly had a real affect upon the substantial rights of the Petitioner. Since these were the only statements given to the jury from the lips of the Petitioner in support of his defenses, their import must be well understood to anyone who has tried a criminal case. Petitioner has also attacked the so-called cumulative statements on grounds of intoxication and voluntariness. Not only did the State introduce these statements to the jury, but under the guise of insanity rebuttal presented prior criminal acts to the jury without the Petitioner ever testifying. The prosecution undoubtedly considered the testimony vital and important since they introduced the testimony in their case-in-chief. Once this testimony was introduced, it was irrelevant whether later testimony from the defense or psychiatrists was introduced, since the State created the error.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) this Court stated:

> "...there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error..." 386 U.S. at 23, Mc Queen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974).

The so-called cumulative evidence on this case is tainted and under the dictates of Chapman,

supra, cannot be used as overwhelming evidence to support the conviction. Petitioner's substantial rights were affected by the admissibility of these statements to his probation officer on a fresh charge and must not be held to be harmless error.

Secondly, the statements made to the probation officer were involuntary and therefore, cannot be harmless error. Petitioner has continually raised this argument but only received acknowledgement of such argument by the District Court of Arizona who referred to the error as a footnote to its Opinion and explained its refusal to consider such argument. The probation officer in his capacity broke down the defenses of the Petitioner. His relationship with the Petitioner and his power to recommend to a judge that the Petitioner not receive bond and be incarcerated for the instant act as a violation of his probation clearly placed the probation officer in a unique position. The probation officer clearly viewed his role as an advocate, but conveyed an entirely different picture to the Petitioner. It is this unique position that placed the Petitioner in such a position that he was coerced and unable to refuse to make a statement to the probation officer lest he be penalized for so doing. The probation officer was going to talk according to him, to the Petitioner whether he had a lawyer or not and

Petitioner had no choice but to talk to the probation officer. Petitioner's statement to the probation officer was, therefore, involuntary and not harmless error. This Court stated in Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978):

> "But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law EVEN THOUGH THERE IS AMPLE EVIDENCE ASIDE FROM THE CONFESSION TO SUPPORT THE CONVICTION." (Emphasis supplied) 437 U.S. at 398.

The Court continued to state in Mincey, supra, that they were not bound by the Arizona Supreme Court's holding of voluntariness but on the contrary were under a duty to make an independent evaluation of the record. Petitioner in the case at bar could have also been held in contempt of court and sent to jail on a rule to show cause as well as suffer the consequences of the violation of probation. He hardly was in a position to exercise rational intellect and free will.

The harmless error rule simply does not apply to involuntary confessions as elicited in this case via Petitioner's probation officer. Lynumn v. Illinois, 372 U.S. 528, 537, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); Chapman

v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705; Davis v. North Carolina, 384 U.S. 737, 80 S.Ct. 1761, 16 L.Ed.2d 895 (1966). Also under the dictates of Davis, supra, the fact Petitioner was not advised of his constitutional rights gives additional support to other circumstances described which make the statements to the probation officer involuntary and not harmless error. Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). Petitioner implores this Court to hold his statements to the probation officer involuntary, and concommitantly, reversible error and remand this case to the Arizona trial courts for a new trial. This case will serve to have a profound affect on all relationships involving probation officers, probationers, parole officers and parolees. It will serve notice that statements made by potential defendants to their probation or parole officers will not have to be made with inhibition and will not therefore disrupt the orderly administration of the courts. If this Court indicates otherwise, at least defendants will know where they stand with probation or parole officers and proceed in other legal fashion.

ARGUMENT II

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED

IN DECIDING THAT PETITIONER'S STATEMENTS TO PSYCHIATRISTS IN VIOLATION OF THE ARIZONA RULES OF CRIMINAL PROCEDURE WERE HARMLESS ERROR, AND THEREBY DEPRIVED PETITIONER OF DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVED PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF IN ACCORDANCE WITH THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioner during his examinations with examining psychiatrists gave his version of the events of the shooting. Under Arizona law, these statements of the facts are inadmissible at the Petitioner's trial, even though he asserts the defense of insanity as Petitioner did in this case. The Courts in ruling on this issue have held the error to be fundamental error but albeit harmless error. Again, the circuitous argument that the statements are merely cumulative to other attacked erroneous statements is cited as support for the interposing of the harmless error doctrine.

A similar situation as in Argument I is found here. Again, the psychiatrists are testifying about what the Petitioner had to say on his defenses of insanity, intoxication and self-defense without the jury ever hearing from the Petitioner

himself. The Petitioner had a right to rely on the Arizona Criminal Rules of Law and not be exposed to this prejudicial wrongdoing. The Petitioner's constitutional right to due process of law and not to incriminate himself were truly violated by the admission of these testimonies. United States v. Alvarez, 519 F.2d 1036 (3rd Cir. 1975); United States v. Cohen, 530 F.2d 43 (5th Cir. 1976); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States v. Baird, 414 F.2d 700 (2nd Cir. 1969); United States v. Williams, 456 F.2d 217 (5th Cir. 1972).

However, the most important consideration is once again not considered by the earlier Courts but raised by Petitioner consistently in the federal courts. The Petitioner's statements to psychiatrists relative to facts were INVOLUNTARY and given under the threat and compulsion that if he did not give the statements to the court-appointed psychiatrists, the Petitioner would suffer the consequences of jail, the non-use and availability of expert witnesses at trial and the prohibition of presenting a medical-based defense of insanity and/or lack of specific intent. Further, Petitioner would be forced to chill his right to present a defense if he exercised his right to remain silent to the State psychiatrists. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Under this compulsion

argument, there can be no harmless error and no exercise by Petitioner of a rational intellect and a free will when he made his statements to the psychiatrists. Mincey v. Arizona, supra; Lynumn v. Illinois, supra; Payne v. Arkansas, supra; Chapman v. California; supra; Davis v. North Carolina, supra, and Blackburn v. Alabama, supra.

The statements were introduced by the prosecution contrary to Arizona law, and more importantly, federal constitutional law, and after the prosecutor had earlier stated he had no intention of introducing these statements. Obviously, the prosecutor risked reversible error in introducing these statements and his misjudgment and unfairness should not be rewarded and protected under the guise of harmless error. Each prejudicial statement in this case is explained away as harmless or not quite sufficient enough to constitute reversible error. The law is not an exercise in semantics but as in this case since we are dealing with a man's life and a 25-year incarceration without the possibility of parole, a conviction should not be sustained without the strictest standards of fair play and justice. One can hardly state that Petitioner received such a trial with admission of such prejudicial statements. To state that they are harmless error is to run this doctrine to the lowest depths to preserve an improper and uncalled for jury verdict. This case

is of particular importance because it defines the relationship between an examining psychiatrist and a defendant and how freely a defendant can talk to a doctor without having to defend the statements at a trial or at least knowing that if he does talk to a doctor what he can expect to be used against him at a subsequent trial.

ARGUMENT III

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT A PSYCHIATRIST APPOINTED TO EXAMINE PETITIONER SOLELY FOR COMPETENCY COULD TESTIFY AT TRIAL AS TO THE SANITY OF PETITIONER AT THE TIME OF THE OFFENSE, AND THEREBY DEPRIVED PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner claims that when a court-appointed psychiatrist examined him it was for purposes of competency only and not for sanity and the Court Order read for competency only and defense counsel at trial made it clear to the trial court at the time said examination would be for competency only. In fact, the same psychiatrists who had examined the Petitioner for competency and sanity

were to examine the Petitioner for a second examination for competency only. The prosecution was in agreement with this Order because they obviously did not want their supporting psychiatrist on the issue of sanity to change his mind. However, the State's psychiatrist was unavailable and they brought in a new psychiatrist to examine the Petitioner while the defense used the same psychiatrist. The trial judge specifically blocked out the request dealing with "any determination be made on the issue of sanity."

The prosecution learning that their new psychiatrist also thought the Petitioner sane, produced him as a witness over objection against the Petitioner at the trial on the issue of Petitioner's sanity and specific intent at the time of the shooting. Petitioner has cited a long line of federal cases supporting his argument, including Ninth Circuit of Appeals cases, but the Ninth Circuit had held that in this case there is no federal question raised. Truly a federal question is raised when a psychiatrist is permitted to testify against a Petitioner's defense, introduce testimony that the Petitioner was convicted and in prison for two (2) years and that the Petitioner had on several occasions attempted to plea bargain his case when a proper ruling would have prevented the psychiatrist from testifying in the first instance. The Fourteenth Amendment requiring

a trial to be held in accordance with due process of law could require no less than a defendant be given notice that an examination by a court-appointed psychiatrist testifying against the defendant at his trial on another completely unrelated issue, that of the defendant's sanity. Truly the Petitioner could have taken all sorts of measures to insure a proper examination for sanity such as the reception of advice from his attorney, taped the interview and provided the psychiatrists with statements relative to sanity and reports of defense witnesses regarding sanity so the psychiatrist would be properly apprised of the Petitioner's previous mental condition at the time of the offense from the defense point of view (not just police reports).

Petitioner also had the option of not allowing the examination for sanity to take place if he were aware the psychiatrist was there for that purpose and that he would be conducting the exam with the potentiality of being a State's witness on the issue of sanity. The defense moved for the competency exam as an officer of the Court and as a professional obligation but not as it turned out to prejudice his own client. If this Court does not protect a Petitioner who properly makes motions before trial courts and receives an order in accordance with that motion, then defense attorneys can do no less than violate professional

ethics. Knowing there is a bona fide issue of their client's competence, defense attorneys would not make a request for such examination lest the trial court's rulings be overrun by a zealous prosecutor and the uncalled for evidence be used against the defendant to bring about his conviction.

The statements to the psychiatrist were not voluntary because as in Argument II, Petitioner thought he had to talk to the psychiatrist. This evidence was not cumulative and severely prejudiced Petitioner's privilege against self-incrimination pursuant to the Fifth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution. This Court must uphold the dignity of trial courts' rulings particularly when they are circumvented and run roughshod over by unfair prosecutors in order to obtain a conviction in violation of due process of law. The prosecutor may strike hard blows, but he is not permitted to strike fowl blows. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Petitioner refers this Court to 28 U.S.C. §2254(d)(7) and (e) as further reasons for this issue to be decided by this Court.

Petitioner also claims the psychiatrists had no basis to form an opinion as argued above as to the notice and Petitioner's preparation and

participation in an insanity examination. Petitioner and his attorney could only be on notice that a competency examination would not be admissible evidence at a jury trial on the issue of insanity or any other issue as to guilt or innocence. Any psychiatrist could say that he could make some statement about the Petitioner's sanity at the time of the offense but that conclusion does not mean that it was made with the comports of fairness and due process of law. It must als be remembered that this examining psychiatrist, by exceeding the parameters of the Court Order, violated the dictates of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and the psychiatrist's statements should not have been admitted into evidence (particularly when the Petitioner never testified at the trial). It is truly difficult to perceive how the Petitioner could have received a fair trial in light of the flagrant abuse of court orders and the subsequent prejudice inured to Petitioner as a result of such abuse. The Ninth Circuit Court of Appeals perfunctory dismissal of this case only serves to enhance the continual deprivation of Petitioner's constitutional rights.

ARGUMENT IV

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE

NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING PETITIONER'S CONFESSIONS AND STATEMENTS TO POLICE OFFICERS AND LAY WITNESSES WERE KNOWINGLY AND VOLUNTARILY MADE, EVEN THOUGH PETITIONER WAS HIGHLY INTOXICATED, AND THEREBY DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

After Petitioner was arrested, he was taken to a hospital and then to a police station where Petitioner allegedly made statements to the police and to his girlfriend which were overheard by the police. These statements were introduced into evidence by the prosecution over objection. The thrust of Petitioner's argument is that he was intoxicated with alcohol at the time he made the statements. Petitioner's blood was analyzed for ethanol approximate'y five (5) hours subsequent to the time of the shooting and was .28 (R-V9-1637). A stipulation between the State and the defense indicated the Petitioner would have had somewhere between .36 and .40 ethanol in his blood if it were to have been analyzed at the time of the shooting. This reading coupled with the Petitioner's earlier beating clearly shows an intoxicated state that undoubtedly prevented the Petitioner from making a statement with rational intellect and free will. Townsend v. Sain, 372 U.S. 293,

83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).

Almost without fail, every witness who observed the Petitioner testified he was highly intoxicated, slurring his speech, swaying, talking slowly and generally impaired. (R-V4-674, 675, 731, 739, 741, 770; R-V6-1095, 1096, 1180; R-V6-885, 895, 928, 929, R-11-19-74, p. 110, 137, 148, 149; R-V8-1423-1454). It is inconceivable that Petitioner could make a voluntary statement in the condition he was in at the time he made his statements. It is estimated by the police that because of the time factor that Petitioner had a .33 and .35 when he made the complained of statements. The nurse from the police department who took the Petitioner's blood stated Petitioner was drunk. A review of the record in this case shows witness after witness testifying to the alcoholic condition of Petitioner. He was found passed out from the alcohol when the police located the Petitioner in a van. Justice Frankfurter in Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed 1801 (1949) stated:

> "There comes a point where this Court should not be ignorant as judges as what we know as men." (338 U.S. at 52).

Anyone reading the record could not get a clearer picture of the Petitioner's intoxication. This

Court is not bound by another court's or jury's findings of voluntariness if this Court believes the historical facts upon which such finding is based are insufficient to meet constitutional standards of due process. Davis v. North Carolina, 384 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). The decision of the Petitioner to incriminate himself made in his intoxicated state was not made freely and without constraint and as such, was a coerced confession. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). The spontaneous statements of a drunken person cannot be trustworthy or reliable. But more importantly than the truthfulness of the statements is the fact they cannot be made freely self-determined. The spontaneousness of Petitioner's statements do not diminish his claim of involuntariness and coercion. Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963). Even if the police say a defendant is sane when he confessed, this Court can hold such confession inadmissible if the PROBABILITY exists that the defendant was, in fact, insane at the time he made the statement. Blackburn, supra. The Petitioner in this case was not probably intoxicated, he was totally drunk. The Fourteenth Amendment is greviously breached when an involuntary confession is introduced into evidence in a criminal prosecution which culminates in a conviction. In light

of the overwhelming evidence of Petitioner's high degree of intoxication at the time he made the complained of statements, due process of law and the right not to incriminate oneself is offended when a court contents itself to merely rely on a clearly erroneous ruling of a lower trial court. Petitioner truly wishes this Court could have been present to see his intoxication when he made his statements, but in lieu of that, he suggests that a review of the record and the witnesses' testimony on this issue would lend itself to the same result: the Petitioner's intoxication and beating rendered his statements involuntary.

ARGUMENT V

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THE EVIDENCE SUPPORTED CONVICTIONS FOR FIRST AND SECOND DEGREE MURDER, AND DEPRIVED APPELLANT OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioner asserts that the evidence at trial did not support a conviction for first-degree

murder and that it was a violation of due process of law for the trial court to instruct the jury on first-degree murder and not to grant Petitioner's Motion for a Directed Verdict. Further, the trial court improperly instructed the jury violating Petitioner's rights to a fair trial.

A. MALICE.

The trial court instructed the jury on malice and defined express and implied malice. (R-V12-2242). The trial court did not explain that implied malice would only support a verdict of second-degree murder but simply told the jury malice is necessary for murder. The trial court made no distinction between first and second-degree murder in relation to malice. The trial court instructed the jury that express malice is when there is shown a deliberate intention to kill. (R-V12-2242). The trial court instructed the jury in accordance with A.R.S. §13-452 which defines murder as "any other kind of willful, deliberate and premeditated killing." Clearly, express malice will support a conviction for first-degree murder. The trial judge told the jury implied malice is where there is no considerable provocation and that any kind of murder other than first-degree is second degree. (R-V12-2242). Therefore, if a defendant shoots and kills another and there is no evidence except the shooting and the death, the jury under Arizona law must imply

that there was malice and return a verdict of second-degree murder. They must not be allowed to imply that there was willfulness, premeditation and deliberation which are the ingredients necessary to constitute first-degree murder and which must be shown by express malice. The trial court failed to instruct the jury properly on which malice applied to which degree of murder; and as a result, the Petitioner was deprived of the judicial guidance to which he was entitled under the due process clause of the Fourteenth Amendment to the United States Constitution.

The trial court also instructed the jury that when the,

> "homocide has been committed with a deadly weapon, and no circumstances in mitigation, justification, or excuse appear, you may imply malice."

If the jury believed that Petitioner used a gun to kill the deceased and nothing further was shown, the trial court told the jury they could imply malice. It did not tell them they could not imply willfulness, premeditation and deliberation. These ingredients cannot be implied; they must be expressly shown.

The trial court's instruction that the presumption of the use of a gun implies malice undoubtedly became prejudicial to the Petitioner when the presumption was laid alongside of the

confusion between express and implied malice, and the failure of the trial court to tell the jury implied malice cannot support a first-degree murder conviction. The Arizona Supreme Court stated that,

> "There was a sufficient showing of malice aforethought and that both express and implied malice will support a conviction of murder."

Petitioner does not contest that malice aforethought is needed to support a conviction of murder. However, the Arizona Supreme Court, the United States District Court and the Ninth Circuit Court of Appeals have followed the same misguided path of the trial court and simply failed to distinguish express and implied malice as to the degrees of murder. To state that express and implied malice will support a murder conviction is in itself not incorrect, except that implied malice will only support second-degree murder. As long as the State of Arizona has decided to distinguish between first and second-degrees, it is incumbent upon the Court to properly define the degrees of murder and what elements are necessary to provide for a conviction of each degree. To use the term "murder" generally is confusing, misleading and a deprivation of Petitioner's right to have the jury properly instructed in accordance with the due process clause of the Fourteenth

Amendment to the United States Constitution.

B. INTOXICATION—SELF-DEFENSE.

Although Petitioner has raised his intoxication as a condition negating his statements on the day of his arrest, he now asserts this intoxication in the much broader sense to reduce his conviction to voluntary manslaughter or second-degree murder. In addition, Petitioner asserts that physical beatings he took from the hands and feet of the deceased shortly before the shooting should also be considered mitigation in reducing his conviction.

Petitioner was clearly intoxicated and unable to form the proper specific intent necessary to constitute first or second-degree murder. A review of the intoxication testimony definitively demonstrates that Petitioner was in a very high degree state of drunkenness when he shot the deceased. The testimony of Capt. Kempe of the Tucson Police Department established that at the precise time of the shooting, Petitioner had a blood alcohol level of somewhere between .36 and .40. This unusually high level was objective evidence from the police. But when this reading is coupled with the observations of the people who came in contact with Petitioner at a time prior, during and following the shooting, it becomes patently evident that Petitioner could not form the requisite specific intent needed for any

degree of murder. The trial court failed to direct a verdict dismissing the first and second-degree murder charges and removing them from the jury's consideration and as a result, deprived the Petitioner of due process of law provided in the Fourteenth Amendment to the United States Constitution. The issue of Petitioner's intoxication was so substantial and basically without contradiction that the matter should not have been submitted to the jury for their deliberation but rather should have been decided by the trial court to negate the charges of first and second-degree murder.

If the prosecution is able to get to a jury on the issue of first or second-degree murder in this case, it is difficult or impossible to perceive a situation where the trial court would ever be able to direct a verdict dismissing a murder charge based on Petitioner's intoxication. The testimony was exhausting as to Petitioner's intoxication. The evidence was clear of the earlier physical beating Petitioner took from the deceased and how this was on his mind when he shot the deceased. However, Petitioner was denied due process of law and his Fourteenth Amendment rights to the United States Constitution when the trial court did not direct a verdict of acquittal in his favor of first and second-degree murder by reason of Petitioner's well-established intoxication and

concommitantly, Petitioner's allegation of self-defense.

C. MITIGATION INSTRUCTION.

1. Lack of Malice.

The trial court also instructed the jury that if the homocide was commited with a deadly weapon and no circumstances in mitigation, justification or excuse appear, you may imply malice. Petitioner has argued that implied malice does not support a first-degree murder conviction. The Petitioner's intoxication in the instant case is certainly the type of evidence indicated by "mitigation" and "excuse". Surely, Petitioner's drunken state contributed to his actions and was proper mitigation and sufficient reason for his conduct. The trial court was obligated to hold this as a matter of law; and since there was mitigation and excuse, malice could not be implied, and Petitioner should have been the recipient of a directed verdict of acquittal on first and second-degree murder. Even if one accepts what may purport to be the Arizona Supreme Court's fallacious inference and reasoning that implied malice can support any degree of murder, the intoxication still dissipates the implied malice requirement and necessitates a directed verdict on first and second-degree murder. The intoxication as a mitigation or excuse did affect Petitioner's ability to premeditate, act willfully and deliberately, and negated the

specific intent necessary for first-degree murder, and the trial court erred in not, at least, directing a verdict of acquittal for first-degree murder. Government of the Virgin Islands v. Downey, 396 F.Supp. 349 (D.C.V.I. 1975).

2. Shift of Burden of Proof.

However, Arizona has interpreted the "no circumstances in mitigation, justification or excuse" instruction to mean that when the State proves a killing and a gun, the burden now falls upon the defendant to come forward with evidence of circumstances to mitigate, justify, or excuse the killing. State v. Schroeder, 95 Ariz. 255, 298 P.2d 255 (1964); State v. Sellers, 106 Ariz. 315, 475 P.2d 722 (1970); State v. Singleton, 66 Ariz. 49, 182 P.2d 920 (1947). Petitioner asserts that such a rule of law and interpretation is a violation of Petitioner's right to due process embodied within the Fourteenth Amendment to the United States Constitution. The instruction given in the instant case does not comport with the law In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed 368 (1970), which stated that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Arizona instruction shifted the burden of proof to the Petitioner and caused him to show that the shooting was without lawful justification. This burden has traditionally been the prosecutor's

burden of proof and to shift the burden by the use of the complained of instruction is a violation of Petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has held that a Maine court using a similar instruction construed the instruction improperly and shifted the burden of proof and violated Petitioner's constitutional right to due process. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The instruction complained of was similar to the Maine instruction, and the Arizona courts have given the instruction the same interpretation as Maine. In giving this instruction, the trial court deprived Petitioner of the judicial guidance to which he was entitled and thereby deprived Petitioner of a fair trial and due process of law under the Fourteenth Amendment to the United States Constitution.

ARGUMENT VI

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT AN INSTRUCTION STATING, "THERE IS NO PRESCRIBED PERIOD OF TIME WHICH MUST ELAPSE BETWEEN THE FORMATION OF THE INTENT TO KILL AND THE ACT OF KILLING" WAS PROPER, AND

DEPRIVED THE PETITIONER OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATED HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner asserts that when a state court uses an instruction that is improper and lends to Petitioner's conviction and thereby violates Petitioner's rights to due process of law, a federal question is raised. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The Ninth Circuit Court of Appeals has dodged ruling on a State instruction that they know in fact is improper and have themselves held in Jones v. United States, 175 F.2d 544 (9th Cir. 1949).

Petitioner asserted as error in his State Brief that the trial court improperly instructed the jury when he told them:

> "There is no prescribed period of time which must elapse between the formation of the intent to kill and the act of killing. It does not matter how quickly or slowly these mental processes succeed each other or how quickly or slowly they are followed by the act of killing. (R-V12-2242).

The Arizona Supreme Court held the instruction

to be proper and discussed the facts of the case necessitating the instruction and its acknowledgement that the instruction was a proper statement of the law. Petitioner asserts he is entitled under due process of law (14th Amendment to the United States Constitution) to have his guilt determined by a jury under appropriate judicial guidance particularly as to the degree of guilt. If the trial court improperly instructs the jury on these issues, the Petitioner is deprived of a fair trial.

In Jones, supra, the Court of Appeals held a similar instruction as given in the instant case to be plain reversible error. The instruction complained of in Jones, supra, stated:

> "There need be no appreciable length of time between the formation of the intent to kill and the killing itself; it may be as instantaneous as successive thought."

The Court concluded that instruction did not properly distinguish, for the jury's consideration, the distinction between first-degree and second-degree murder. In dealing again with a similar instruction, the Court in Bullock v. United States, 74 App. D.C. 220, 122 F.2d 213 (1941) in holding the instruction erroneous, stated:

> "To speak of premeditation and deliberation which are instantaneous or

> which take no appreciable time is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder." (122 F.2d at 213 and 214).

If the complained of instruction in the instant case did not use the words "no prescribed period of time" and "it does not matter how quickly or slowly these mental processes succeed each other or how quickly or slowly," the instruction would not be offensive and error. If the instruction stated the idea was conceived and intended before the act which produced death, it would be proper. But the instant instruction left the jury without means to distinguish between first and second-degree murder. Even Arizona law as it presently stands requires an instruction stating:

> "The express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homocides which are the result of mere unconsidered or rash impulse hastily executed." Moore v. State, 65 Ariz. 70, 82, 174 P.2d 282 (1946).

The instruction at bar can readily be interpreted by the average jury layman to mean that when

a defendant pulls the trigger and fires a weapon, he can demonstrate premeditation and deliberation from that particular point until the final act of death. Clearly, any shooting can be shown to be premeditated and deliberate under this instruction by merely demonstrating a firing of a gun at someone and that person's eventual death. The emphasis on time is at best highly confusing to lawyers, least of all lay jurors. If someone shoots someone with malice aforethought, which means with a deliberate intention or without provocation, that means that the gun was pointed at the deceased with the idea in mind to kill that person. At that point and until the death, the jury would be unable with the complained of instruction to distinguish between first and second-degree murder. The trial court suggestively could have told the jury first-degree murder required premeditation and deliberation and covers calculated and planned killings while homocides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second-degree. Parma v. United States, 399 F.2d 559 (D.C.C.A. 1968). The trial court had an obligation to draw a most important distinction for the jury so they could properly deliberate on the degrees of murder. Petitioner is entitled under the due process clause of the Fourteenth Amendment to the United States

Constitution to proper judicial guidance, and the trial court's failure to provide this obligation deprived the Petitioner of a fair trial. Petitioner requests a new trial with a proper clarificiation on the law of the degree of murders or in the alternative, to reduce this conviction to second-degree murder.

In Bustamante v. Cardwell, 497 F.2d 556 (9th Cir. 1974) it was held that this Court can review instructions to see if federal constitutional error undermined the fact-finding process. Woods v. Estelle, 547 F.2d 269 (5th Cir. 1977); United States v. Fogel, 403 F.Supp. 104 (D.C. Ill. 1975). Petitioner surely must be permitted to use federal case law to overturn a fundamentally unfair, constitutionally infirm instruction on the law, as in the case at bar. The instruction was highly prejudicial in causing the jury to convict the Petitioner of first-degree murder. Petitioner was deprived of due process of law when the trial court improperly guided the jury into a conviction to which it would not otherwise have arrived. Shepherd v. Nelson, 432 F.2d 1045 (9th Cir. 1970); 28 U.S.C. §2254(d)(7), §2254(e).

CONCLUSION

The Petitioner respectfully prays this Court for a Writ of Certiorari be granted to allow for a review of the constitutional issues that would

ultimately provide Petitioner with a new trial commensurate with his Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

RESPECTFULLY SUBMITTED,

STANTON BLOOM
32 N. Stone
Suite 610
Tucson, Arizona 85701
Attorney for Petitioner

Stanton Bloom

IN THE

SUPREME COURT OF THE UNITED STATES

_____

NUMBER_____

BOBBY REED MAGBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
COUNTY OF PIMA) ss.

STANTON BLOOM, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of the following documents on the Attorney General, State of Arizona, 200 State Capitol Building, Phoenix, Arizona 85007, and has forwarded by mail, a copy of the following documents to the Solicitor General, Department of Justice, Washington, D. C. on this 25 day of October, 1979:

PETITION FOR WRIT OF CERTIORARI

Stanton Bloom
STANTON BLOOM

SUBSCRIBED AND SWORN to before me this 25 day of October, 1979 by STANTON BLOOM.

Gina Fonken
NOTARY PUBLIC

My commission expires:
My Commission Expires Feb. 15, 1982

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

THE STATE OF ARIZONA, Appellee, v. BOBBY REED MAGBY, Appellant.	)	No. 3112

Appeal from the Superior Court of Pima County
Cause No. A-24765
The Honorable J. Richard Hannah, Judge
JUDGMENT AFFIRMED

Bruce E. Babbitt, The Attorney General Phoenix
By Heather A. Sigworth, Assistant Attorney General
Attorneys for Appellee

John W. Neis, Pima County Public Defender Tucson
By Anne-Marie Brady, Assistant Public Defender
Attorneys for Appellant

CAMERON, Chief Justice

This is an appeal by defendant, Bobby Reed Magby, from a jury verdict and judgment of guilt to the crime of first degree murder, A.R.S. §§13-451 and 452, with a sentence of life in the Arizona State Prison without the possibility of parole prior to the serving of 25 calendar years in the state prison.

Defendant raises the following questions on appeal:

1. Was it error to permit defendant's probation officer to testify concerning statements made by defendant while in custody and without first being given his Miranda warnings?
2. Were certain statements made by Magby inadmissible because he was intoxicated?
3. Did the court err in permitting a psychiatrist who examined defendant to determine his competency to stand trial to also testify as to statements made by Magby concerning the crime?
4. Did the court err in admitting the testimony of a psychiatrist who examined defendant concerning his competency to stand trial to also testify as to defendant's sanity at the time of the crime?
5. Was the first degree murder instruction an incorrect statement of the law?
6. Does the evidence support a verdict of first degree murder?

The facts necessary for a determination of this matter are as follows. On the morning of 22

December 1973, Magby and his friend, Wayne Siegfred, began drinking a mixture of vodka and orange juice from a wine jug. Later that morning, after replenishing their vodka and orange juice, Magby and Siegfred went to Carl's Body Shop where they joined several other men, including the victim Danny Clay. The men spent their time drinking, talking and shooting a sling shot.

Magby and Clay got into a fight about 12 noon. Magby punched the victim twice before Clay retaliated and knocked Magby to the ground. Clay and another man, Larson, picked Magby up and helped him into his van. While assisting Magby, Clay apologized for having hit him.

Magby later emerged from the van carrying a sawed-off shotgun. Magby tapped Clay on the shoulder to get his attention, yelled an obscenity and shot the victim in the face from a distance of less than six feet. The entire right side of Clay's head was blown off.

An eyewitness, Ralph Vogler, testified as follows:

"Q What, if anything, happened after he came around from the area of the van and the Buick?

"A Wayne tried to get a drink from him. He backed off and let Wayne have the jug for a drink and then he backed off over here a little bit and then Bobby come out. We sit here talking, me and Loser, sit here talking and Bobby came around between the van and walked around Danny Clay and tapped him on the shoulder and said a couple of words and had a shotgun in his hand raised up, pointed at his nose and the hammer was cocked.

I stepped back trying to get behind Bobby and we was right next to the wrecker and then lit off with the shotgun.

"Q Did he say anything before that?

"A Used a few foul words

"Q What did he say?

"A 'Hey, mother-fucker,' and then hesitated a little bit and blew him away."

And Magby's friend "Loser" testified:

"Q Mr. Siegfred, at this point simply tell us as best you can remember without regard to what other people told you what you remember happening when you came out after making the telephone call and what in fact you did.

"A I came out from inside the shop,

went between my van and the car. Before I got into the van I put my hands up like this (indicating), swiveled myself around and pulled myself onto the chest. Both doors were open. As I was getting in, about half-turn, I heard the gun go off. I seen about that much, but I didn't see it until I was just turning. About that time it was off.

* * * * * * * * * * * * *

"Q Now, just before you saw the barrel and heard the shot, did Mr. Clay raise his hand at all or did he do anything with his hands?

"A Well, he was holding the jug.

"Q Did he raise his hand up with the jug?

"A (No response)

"Q Let me rephrase that. How was he holding the jug?

"A One finger on it.

"Q Were his arms to the side or were they above his head. Where were they?

"A Well, from what I heard, kind of relaxed, holding the jug like this and one arm down (indicating).

* * * * * * * * * * * * *

"Q How much time elapsed between the time that he made that statement until the time when you actually heard the boom?

"A Well, all at the same time."

And:

"Q Did you actually see Mr. Magby after the shot was fired?

"A A few seconds afterwards, yes.

"Q Was he holding the shotgun at this time?

"A Yes."

Magby then fled on foot. About one hour later he was apprehended by the police when he was discovered passed out in a truck.

An information was filed on 3 January 1974 charging Magby with the first degree murder of Daniel Joseph Clay. On 2 December 1974, the jury found Magby guilty of first degree murder. From this verdict and the judgment of the court defendant appeals.

TESTIMONY OF PROBATION OFFICER

Defendant argues that it was error to permit his probation officer, John Burch, to testify concerning statements made by defendant while in custody. We agree.

Two days after defendant was arrested, Burch visited him at the jail and without giving him the Miranda warnings, asked him about the shooting of Clay. At the trial, Burch testified as follows:

"Q And, did you start asking him questions at this time?

"A I asked him to tell me if he would, what transpired, what happened, why he was there.

"Q And what did he say?

"A He related to me in his own words more or less what happened.

* * * * * * * * * * * * * * * *

"Q What specifically did he say about the shooting incident itself?

"A Just the fact that he had gone to the truck, gotten the gun, and returned and shot the guy."

We have held that statements to a probation officer about crimes committed during the term of probation are admissible in a hearing to revoke probation, State v. Fimbres, 108 Ariz. 430, 501 P.2d 14 (1972), and this would be true regardless of whether the probationer was read his Miranda rights prior to such admissions. We have also held that a confession of a crime to a probation officer without Miranda warnings after conviction of that crime may be used by the judge in sentencing. State v. Jones, 110 Ariz. 546, 521 P.2d 978 (1974). We do not believe, however, that in-custody statements about a later crime made to a probation officer without Miranda warnings should be admissible in the State's case when the probationer is later tried for that crime. We agree with the Kansas Supreme Court:

> "We hold the Miranda decision places a duty upon the officers of the Kansas State Board of Probation and Parole, when they are investigating the commission of a fresh or new felony by a parolee, to comply with the mandate in Miranda, if the incriminating statements they elicit from a parolee are to be admissible as evidence in the prosecution of the new offense. On the facts in this case the incriminating statements made by the appellant to the parole officer were inadmissible in evidence." State v. Lekas, 201 Kan. 579, 584, 442 P.2d 11, 16 (1968).

Although one jurisdiction has held that a defendant, by accepting probation, in effect, makes a continuous waiver of his Miranda rights, Nettles v. State, 248 S.2d 259 (Fla.App. 1971), we believe that Miranda must be followed before statements to a probation officer concerning a new crime may be admitted at the trial of that new crime. The

Fifth Circuit has stated:

> "* * *We have considerable doubt as to the propriety of even calling the parole officer as a witness for such a purpose. But, pretermitting that, we have no doubt that the testimony was inadmissible unless the officer gave prior Miranda warnings. A parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer." United States v. Deaton, 468 F.2d 541, 544 (5th Cir. 1972). See also State v. Gallagher, 38 OhioSt.2d 291, 313 N.E.2d 396 (1974), vacated and remanded, _____ U.S._____, 96 S.Ct. 1438, 47 L.Ed.2d 722.

The admission of Burch's testimony was error.

WERE CERTAIN STATEMENTS BY DEFENDANT INADMISSIBLE BECAUSE HE WAS INTOXICATED?

During the time defendant was being "booked" at the jail, he was read his Miranda rights. When asked if he would answer some questions he responded by asking if he could make a telephone call which he was allowed to do on the phone in the station house. He called his girl friend and made several admissions which were overheard by the police officers who testified to the conversation at the trial. Defendant is reported to have said to his girl friend as to why he was in jail:

> "Because I just blew some mother-fucker away * * * because he was beating on my head and I don't let no mother-fucker beat on my head."

Later, when defendant gave blood for a blood alcohol test, he was asked if he would answer some questions and refused but later made other admissions stating:

> "I think this whole thing should be considered self-defense. The man knocked me down twice. I told him not to do it again. He looked like he was going to do it again so I got my gun and blew his fucking head off. Lord help me, but that is what I did. I blew his fucking head off."

Defendant asserts that since he was intoxicated at the time he made these statements to his girl friend and the police, these admissions were inadmissible at his trial. We have stated:

> "* * * proof that the accused was intoxicated at the time he confessed his guilt will not, without more, prevent the admissibility of his confession. * * *"

State v. Clark, 102 Ariz. 550, 553, 434 P.2d 636, 639 (1967).

In the instant case, though it is obvious that defendant was under the influence of alcohol, the testimony of the officers does not indicate that the statements were so influenced by the intoxication so as to be involuntary or untrustworthy.

The testimony of the officer indicates that the defendant's speech was not slurred, that he stood while using the telephone, that he appeared to understand what was being said to him and what he voluntarily said to the officers and his girl friend. The nurse who took the blood sample testified defendant was cooperative and aware of his surroundings. We find no error.

STATEMENTS TO THE PSYCHIATRIST

Defendant contends it was reversible error to permit Dr. John Clymer, a psychiatrist, to testify to statements made by defendant concerning the shooting. Dr. Clymer was one of the psychiatrists appointed to determine whether defendant was competent to stand trial. At the hearing on defendant's competency to stand trial, the defendant objected to any testimony concerning the facts of the shooting. Defendant's objections were sustained. At the trial itself, at which time defendant's sanity at the time of the shooting was an issue, the State called Dr. Clymer and after other testimony asked him the following:

> "Q Now, Doctor, I want to go specifically into what Mr. Magby told you on February -- I believe the 28th -- in reference to the incident itself.
>
> "A In reference to the incident itself, that he was with his friends, that they had this Christmas bottle that they were drinking and that Clay had gotten into a scuffle with him, broke it up and that Clay had come down on him again and this was Wayne Siegfred who hollered at him and then he says, 'There was this flash and then I was running through the desert and they found me in a car and I was taken to the emergency room at Pima County Hospital. I had some scratches on my face and then to jail.' This is the verbatim account of what he told me about the episode."

The disclosure of this information violated Rule 11.7(b)(1), Arizona Rules of Criminal Procedure 1973, 17 A.R.S. The rule which deals with mental examinations to determine competency, provides:

"b. Privileged Statements of Defendant

"(1) No statement of the defendant obtained under these provisions, or evidence resulting therefrom, concerning the events which form the basis of the charges against him shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, without his consent."

And A.R.S. § 13-1621 provides:

"J. In any of these proceedings, both the defendant and the state shall have the right to have the defendant examined by psychiatrists appointed by the court for the purpose of presenting testimony at any appropriate hearing. Information obtained from the defendant under these provisions shall not be used against him at any trial in which his guilt or innocence is to be determined, unless the defendant consents."

And we have stated:

"The obvious policy underlying the physician-patient privilege is that patients should be encouraged to make full and frank disclosures to those who are attending them. While we do not believe that allowing Dr. Baker to testify about his conclusions concerning defendant's sanity derogates from this policy, we do think that to permit even a psychiatrist acting for the court to transmit a defendant's incriminating statements to a jury is fundamentally unfair. * * * " State v. Evans, 104 Ariz. 434, 436, 454 P.2d 976, 978 (1969).

Both Rule 11.7(b)(1) and A.R.S. § 13-1621 provide that evidence obtained concerning the crime may not be presented without the consent of the defendant. Although the defendant made no objection to the introduction of the evidence, we believe that something more is required. The record must affirmatively show that the defendant did, in fact, consent to the introduction of this evidence.

We believe it is error to introduce this evidence at the trial without a showing of defendant's consent. To allow this information to be admitted without defendant's consent would have a chilling effect on the honest and free flow of information between the doctor and patient while the patient is being examined as to his competency to stand trial. This court has stated:

"* * * We believe that insulating a

defendant from the possibility that an examining psychiatrist will repeat on the stand defendant's 'confession' to him or other damaging admissions will promote the free interplay between patient and physician which is essential to obtaining a clear picture of defendant's mental health. * * * "
State v. Evans, supra, 104 Ariz. at 436, 454 P.2d at 978.

We hold it was error to admit this testimony by Dr. Clymer.

DID THE TRIAL COURT ERR IN ADMITTING DR. HOOGERBEETS' TESTIMONY

Dr. Jacob D. Hoogerbeets also examined defendant for competency and testified at the competency hearing. At the trial, Dr. Hoogerbeets was called as a rebuttal witness by the State to testify as to defendant's sanity at the time of the offense. The defendant filed a written motion to preclude Dr. Hoogerbeets from testifying at the trial concerning the defendant's sanity at the time of the offense which motion was denied.

The defendant argues that a psychiatrist appointed to examine a defendant solely for the purpose of determining the defendant's competence to stand trial may not thereafter testify as to the defendant's mental state at the time of the offense. We disagree. While the psychiatrist may not testify without consent as to defendant's admissions concerning the crime itself, he may give his opinion, if he has any, and if there is a proper foundation, as to defendant's sanity at the time of the offense. We agree with the reasoning of our Court of Appeals (Rule 250 is the predecessor to Rule 11 of the 1973 Rules of Criminal Procedure):

"The defendant raised the question concerning the propriety of a qualified medical expert who examines a defendant under Rule 250, Rules of Criminal Procedure, 17 A.R.S., to testify as to the sanity of a defendant at the time of the commission of the crime in question. It is not to be assumed that a mental examination under Rule 250 is as thorough as a mental examination to determine sanity at the time of the commission of the offense. (citation omitted) However, it is our opinion that if there can be established a foundation upon which the medical expert is able to base an opinion as to a defendant's sanity at the time of the commission of the offense that he would be

qualified to testify, the limited type examination going merely to the weight of the testimony." State v. Sexton, 4 Ariz.App. 41, 43, 417 P.2d 554, 556 (1966).

We find no error.

FIRST DEGREE MURDER INSTRUCTION

The defendant contends that "the trial court's instruction to the jury on first degree murder unduly stressed the rapidity of the thought process and failed to emphasize the requirement of premeditation and deliberation." We disagree. We have stated:

"* * * [t]here need, however, be no appreciable space of time between the intention to kill unlawfully and the act of killing. They may be as instantaneous as the consecutive thoughts of the human mind." State v. Eisenstein, 72 Ariz. 320, 333, 235 P.2d 1011, 1020 (1951).

The court in the instant case instructed the jury as follows:

"* * * There is no prescribed period of time which must elapse between the formation of the intent to kill and the act of killing. It does not matter how quickly or slowly these mental processes succeeded each other or how quickly or slowly they are followed by the act of killing.

"In order to find a deliberate and premeditated killing you must find more reflection on the part of the defendant than is involved in the mere formation of the specific intent to kill."

Premeditation need not be prolonged. In the instant case, defendant, after being helped into the van, had time to remove the gun from its place in the van, get out, walk around the van to defendant's back and wait for him to turn around. We think there was sufficient evidence of premeditation from which the judge could instruct and the jury could find that the defendant was guilty of a wilful, deliberate, and premeditated killing. State v. McIntyre, 106 Ariz. 439, 477 P.2d 529 (1970). We believe the instruction in this case on deliberation and premeditation correctly states the law. State v. Richmond, 112 Ariz. 228, 540 P.2d 700 (1975); State v. Maloney, 101 Ariz. 111, 416 P.2d 544 (1966).

DOES THE EVIDENCE SUPPORT A VERDICT OF FIRST DEGREE MURDER?

Defendant contends that the evidence does not support a conviction for first degree murder. The defendant contends:

(a) There was no showing of express malice aforethought to support a finding of first degree murder.

(b) Defendant was so intoxicated that he was incapable of premeditation.

(c) There was adequate provocation to reduce the charge from murder to manslaughter.

(a) Malice

Absent justification, State v. McIntrye, supra, the jury may find malice from the use of a gun or other deadly weapon. State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974); State v. Sellers, 106 Ariz. 315, 475 P.2d 722 (1970). Defendant contends that there are two types of malice aforethought, express and general, and that the inference of malice from the use of a gun will support general malice only and that the most defendant could be convicted of is second degree murder as there must be specific malice to support first degree murder. We disagree. Our statute does not admit to such a result:

> "§ 13-451. Murder and malice aforethought defined
>
> "A. Murder is the unlawful killing of a human being with malice aforethought.
>
> "B. Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart."

Malice aforethought is an element of murder and distinguishes murder from manslaughter. Both express and implied malice will support a conviction of murder. In the instant case, there was a sufficient showing of malice aforethought to support a conviction of murder.

(b) Defendant's Intoxication

Magby next contends that he was intoxicated to such an extent that his first degree murder conviction should be reduced to manslaughter, or in the alternative to second degree murder, because defendant's intoxication negated premeditation and deliberation. We disagree. The jury was given an instruction on both grades of murder as well as voluntary manslaughter. Evidence was introduced at trial which showed that Magby had consumed a substantial amount of alcohol at the time of the offense and had a blood alcohol content of .26 taken 3 to 4 hours after the shooting. The jury was properly instructed that voluntary intoxication may produce a state of mind which

incapacitates an accused and prevents him from forming the malicious intent or malice aforethought which is an essential element of murder. State v. Coward, 108 Ariz. 270, 496 P.2d 131 (1972). Whether the intoxication negated the malice and reduced the crime from murder to manslaughter is a question of fact to be determined by the jury. State v. Duke, supra.

(c) Provocation

Finally, defendant alleges that the evidence supports his contention that the fight between him and Clay was adequate provocation to reduce the charge to voluntary manslaughter. We do not agree. The jury was properly instructed on the issue of provocation and whether there was adequate provocation to reduce murder to manslaughter is a question of fact to be resolved by the jury. Roser v. State of Arizona, 45 Ariz. 264, 42 P.2d 613 (1935).

We find no error.

DISPOSITION

We have noted that it was error to admit the testimony of the defendant's probation officer and Dr. Clymer concerning defendant's statements about the shooting. We do not believe, however, that these errors mandate reversal. The facts of the shooting were testified to at the trial by two eyewitnesses and sustained by other admissible testimony. The statements by the probation officer and Dr. Clymer, while erroneous, were merely cumulative evidence of the accused's guilt which was overwhelmingly established by other evidence and did not contribute to the verdict, and we believe were harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

Judgment affirmed.

JAMES DUKE CAMERON, Chief Justice

CONCURRING:

FRED C. STRUCKMEYER, JR., Vice Chief Justice

WILLIAM A. HOLOHAN, Justice

FRANK X. GORDON, JR., Justice

HAYS, Justice, specially concurring.

I concur in the majority opinion except that I cannot agree that testimony from a psychiatrist concerning defendant's statements as to the events surrounding the charge creates fundamental error. Although this error is not specifically denominated as such in the majority opinion, the requirement

that there must be an affirmative showing on the record of consent by the defendant himself spells out fundamental error without mentioning it.

The list of requisite litanies continues to grow as the search for truth becomes an obstacle race rather than a dash, and juries sit impatiently while court and counsel in chambers make affirmative showings for the record. It is no abuse of due process in my mind to require the defendant to object before such testimony is barred. If defense counsel elicits the proscribed testimony from a psychiatrist, where is the affirmative showing of defendant's counsel? Does this fundamental error mandate reversal?

JACK D. H. HAYS, Justice

FILED: July 20, 1976

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BOBBY REED MAGBY, Petitioner, vs. JOHN MORAN, Director, et al., Respondents.	No. Civ. 77-744 Phx. WPC MEMORANDUM AND ORDER

Bobby Magby was convicted of first degree murder after a jury trial and sentenced to life in the Arizona State Prison without possibility of parole for 25 years. The judgment was affirmed by the Arizona Supreme Court. State v. Magby, 113 Ariz. 345, 554 P.2d 1272 (1976). Magby's petition for a writ of habeas corpus raises essentially the same issues decided on appeal. As to these questions, Magby has exhausted the available state remedies.[1] 28 U.S.C. § 2254(b).

The petition raises six issues:

1. Whether evidentiary use of admissions made to a probation officer, who failed to give Miranda warnings, was prejudicial error?

2. Whether evidentiary use of admissions to an examining psychiatrist was prejudicial error?

3. Whether evidentiary use on the issue of sanity of the expert opinion of a psychiatrist, who

examined the petitioner solely on competency to stand trial, was error?

4. Whether admissions made by petitioner to police officers while in custody were voluntary?

5. Whether the prosecution established petitioner was guilty of first degree murder beyond a reasonable doubt?

6. Whether the jury instructions were proper?

The threshold issue is whether the Court must conduct an evidentiary hearing on any of these grounds under Townsend v. Sain, 372 U.S. 239 (1963), or 28 U.S.C. § 2254(d). A pretrial hearing was conducted as to whether Magby's admissions to the police officers were voluntary. The trial court decided by minute entry that they were voluntary. See Jackson v. Denno, 378 U.S. 368 (1964); Hart v. Eyman, 458 F.2d 334 (9th Cir. 1972), cert. denied 407 U.S. 916 (1972). It appears that Magby received a full, fair, and adequate hearing in the state court. 28 U.S.C. § 2254(d). The remaining grounds for reversal raise solely issues of law based upon the trial transcript. Therefore, an evidentiary hearing is not required.

Magby argues that he was so intoxicated while in custody that certain statements made to the police while in custody were involuntary. See Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968). The trial court held a full hearing on this issue. All the material facts were adequately developed, and the merits of the factual dispute were resolved against the petitioner. "In this condition of the record, the district court might have disposed altogether with an evidentiary hearing and accepted as valid the state judge's conclusion." Helmick v. Cupp, 437 F.2d 321, 323 (9th Cir. 1971), cert. denied 404 U.S. 835 (1971). The Court accepts as valid the trial court's finding on voluntariness. 28 U.S.C. § 2254(d).

At trial, Magby's probation officer testified as to statements made by Magby while in custody. The probation officer had visited Magby in jail and questioned him about the alleged crime without complying with Miranda v. Arizona, 384 U.S. 436 (1966). A psychiatrist who examined Magby also testified as to statements made by the petitioner. Under Arizona law, these statements are within the physician-patient privilege. A.R.S. § 13-1621. Although the Arizona Court held admission of this evidence was error, the error was ruled harmless. State v. Magby, supra at 349-51, 353, 554 P.2d at 1276-78, 1280; see Chapman v. California, 386 U.S. 18 (1967).

Magby argues that admission of such evidence was prejudicial, violating due process rights to a fair trial. To ascertain whether error is harmless the entire record must be considered and the probable effect of the error determined. C. Wright,

Fed. Prac. and Pro.: Criminal § 854. The Court has read the lengthy trial transcript. The inadmissible evidence was cumulative to otherwise properly admitted evidence; for example, the evidence was cumulative to the voluntary admissions made to the police officers. See State v. Magby, supra at 348-51, 554 P.2d at 1275-78. Therefore, the Court concludes that admission of the challenged evidence was harmless beyond a reasonable doubt.

Magby's remaining objections as to the sufficiency of the evidence, the competency of certain psychiatric testimony, and the adequacy of the jury instructions were correctly resolved by the Arizona Supreme Court. State v. Magby, supra at 351-353, 554 P.2d at 1278-80. The Court adopts the reasoning of the Arizona Supreme Court as its own. Therefore,

IT IS ORDERED:

The petition and action for writ of habeas corpus is dismissed.

DATED January 3, 1978.

United States District Judge

FOOTNOTE

[1]The petition for writ of habeas corpus suggests an issue not raised in the state proceedings. The papers imply that statements made by Magby to a probation officer and to a psychiatrist may have been involuntary. Cf. United States v. Bernett, 495 F.2d 943, 948-49 (D.C. Cir. 1974) (relationship between Miranda and voluntariness issues). Evidentiary use of involuntary admissions contravene the Fifth Amendment, and arguably can never constitute harmless error. See C. Wright, Fed. Prac. and Pro.: Criminal § 855. Petitioner's reply memorandum disclaims any intent to raise this issue, however. Cf. Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976) (federal court cannot address the merits of any issue until the available state remedies are exhausted as to every issue in the petition). Therefore, the Court will not assess the procedural or substantive implications of this issue.

FILED: January 3, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOBBY REED MAGBY,
Plaintiff-Appellant,
vs.
JOHN MORAN, Director, Arizona State Department of Corrections, and HAROLD CARDWELL, Warden, Arizona State Prison,
Defendants-Appellees.

No. 78-1700

MEMORANDUM

Appeal from the United States District Court for the District of Arizona

Before: DUNIWAY and WALLACE, Circuit Judges, and BLUMENFELD,* District Judge

Magby appeals from a judgment denying his petition for a writ of habeas corpus. He was convicted in an Arizona State Court of murder in the first degree and was sentenced to life imprisonment with no possibility of parole for 25 years. On appeal to the Arizona Supreme Court, his conviction was affirmed. State v. Magby, 1976, 113 Ariz. 345, 554 P.2d 1272. We affirm.

*The Honorable M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut sitting by designation.

I. Voluntariness of Admissions.

The admissions in question are described and quoted in the Arizona Supreme Court's opinion at 554 P.2d 1276-1977. Before the trial, the trial judge held hearings to determine whether, in the light of Magby's intoxication, these admissions were voluntary. The court held that they were voluntary. In this case, the district judge examined the transcript of the hearings and held that the trial judge's findings were fully supported by the evidence. We, too, have examined the transcript, and we agree.

Magby relies heavily upon our decision in Gladden v. Unsworth, 9 Cir., 1968, 396 F.2d 373. This reliance is misplaced. In Gladden, as in this case, it was claimed that certain admissions by the defendant were made at a time when he was so intoxicated that they could not be voluntary. We held that there was much evidence in the record to support such a conclusion, but we did not hold that the admissions were involuntary as a matter of law. On the contrary, we remanded the case with directions that the district court should give the state court a reasonable opportunity to hold an evidentiary hearing concerning the voluntariness of the admissions, 396 F.2d at 381. In the case at bar, such hearings were held and it was only after the court then determined that the admissions were voluntary that they were admitted

in evidence.

II. Statements to the Probation Officer

At the time of the killing, Magby was on probation. The homocide occurred at about 12:30 P.M. on December 22, 1973. Two days later, his probation officer interviewed Magby at the jail and asked Magby to tell him what happened. The conversation is quoted in the opinion of the Arizona Supreme Court at 554 P.2d 1275-1276. The Arizona court held that it was error to admit this testimony because the probation officer gave Magby no warning as required by Miranda v. Arizona, 1966, 384 U.S. 436. We assume, for the purposes of this decision, that that conclusion is correct.

The Arizona court then went on to hold (554 P.2d at 1280) that the receipt of the testimony of the probation officer was harmless beyond a reasonable doubt under Chapman v. California, 1967, 386 U.S. 18, and Harrington v. California, 1969, 395 U.S. 250. We have examined the entire transcript of the trial and we are in agreement with the Supreme Court of Arizona. The testimony of the eye witnesses quoted in the opinion of the Supreme Court of Arizona at 554 P.2d 1274-1275, and Magby's admissions which we have mentioned above, one of which was confirmed by Magby's girl friend to whom that admission was made, are far more vivid and far more damaging to Magby than anything in the testimony of the probation officer. We cannot believe that the probation officer's tepid, cumulative, testimony added anything which persuaded the jury to return its verdict.

III. Statement to the Psychiatrist.

The Supreme Court of Arizona held, 554 P.2d 1277-1278, that it was error to admit testimony by a psychiatrist, who had been appointed to determine whether Magby was competent to stand trial, as to Magby's description to the psychiatrist of what occurred when the victim was killed. Reliance was placed upon A.R.S. § 13162 and Arizona Rules of Criminal Procedure, Rule 11.7(b)(1). We have some doubt as to whether the point presents a federal constitutional question. But assuming for the purpose of this case that it does, we agree with the Supreme Court of Arizona (554 P.2d at 1280) that the doctor's statement was harmless beyond a reasonable doubt.

IV. Testimony of a Psychiatrist Appointed to Determine Competency to Stand Trial as to the Sanity of the Defendant when the Offense was Committed.

This contention is discussed in the opinion of the Arizona court at 554 P.2d 1278-1279. We do not think that it raises a federal constitutional question. Magby does not claim that the doctor had no basis on which to form an opinion.

V. The Court's Instructions as to First Degree Murder.

These are discussed by the Arizona court at 554 P.2d 1279. As to these also, we do not think that a federal constitutional question is presented.

VI. Sufficiency of the Evidence.

Finally, Magby argues that the evidence is not sufficient to support a determination that the murder was murder in the first degree. The definition of murder, and of degrees of murder, in Arizona is up to the legislature and the courts of Arizona; it is not the province of the United States courts to supply that definition. The Arizona court held that the evidence supports the findings of the jury within the meaning of the Arizona law. We have reviewed the transcript of the trial, "in the light most favorable to the prosecution, [and our review] convinces us that a rational fact finder could readily have found [Magby] guilty beyond a reasonable doubt of first degree murder under [Arizona] law." Jackson v. Virginia, 1979, _____ U.S._____ (June 28, 1979, slip op. at 16-17).

Affirmed.

FILED: August 6, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

BOBBY REED MAGBY, Petitioner-Appellant, vs. JOHN MORAN, Director, Arizona State Department of Corrections, HAROLD CARDWELL, Warden, Arizona State Prison, State of Arizona, Respondents-Appellees.	No. 78-1700 O R D E R

Before: DUNIWAY and WALLACE, Circuit Judges, and BLUMENFELD, District Judge

The petition for a rehearing is denied.

FILED: September 13, 1979

Supreme Court, U. S.
FILED
NOV 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-690

BOBBY REED MAGBY,

Petitioner,

-vs-

JOHN MORAN, Director, Arizona State Department of Corrections, HAROLD J. CARDWELL, Warden, Arizona State Prison, State of Arizona,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

CRANE McCLENNEN
Assistant Attorney
General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENTS

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Attorney General of
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WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

CRANE McCLENNEN
Assistant Attorney
General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENTS

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STATEMENT OF THE CASE

Respondents submit this factual background:

During the first competency hearing to determine petitioner's ability to stand trial, the prosecutor, in that context and at that time, indicated that he would not, at trial, have Doctor Clymer relate petitioner's statements made to the doctor during the examination regarding the instant offense. (R.T., First Competency Hearing, dated May 20, 1974, at 7-10; see also the same R.T., First Competency Hearing, dated May 21, 1974 at 87-91.)

A voluntariness hearing was held concerning petitioner's telephonic statement to his girl friend. The police officer who overheard this statement testified that:

A few minutes before the statement was made, petitioner was advised of his constitutional rights (R.T., Voluntariness Hearing, dated Sept. 5, 1974, at 150-51); petitioner indicated that he understood the advisement and wanted to see (or to call) his probation officer rather than answer questions -- thus, petitioner was not interrogated at that time (id. at 152-53); petitioner proceeded to supply the police officer with some basic information (name, address, date of birth, age and telephone number) pursuant to the booking process (id. at 154-56); during the booking process, petitioner requested the opportunity to make a telephone call (id. at 156); petitioner provided the girl friend's name and her telephone number from memory (id. at 157); the telephone call occurred at approximtely 3:30 p.m. on the day of the shooting incident -- as

will be shown later, the shooting incident or the instant offense (a homicide) occurred at approximately 12:30 p.m., or 3 hours before the telephone call (id. at 158); during the telephone call, petitioner was overheard to state to the girl friend the following, which was not the product of police interrogation:

> They got me in jail on a murder charge. Because I blew some mother-fucker away. Because he was beating on my head and I don't let no mother-fucker beat on my head.

(id.); petitioner stood without any assistance from anyone or anything during the call (id. at 159); just before, during and just after the call, the police officer was able to communicate with petitioner without any problem (id. at 164); additionally, petitioner appeared to understand the officer and his surroundings (id. at 164-65), and the girl friend agreed that petitioner's speech

seemed normal; she agreed with the substance of petitioner's statement as related by the police officer. (R.T., Voluntariness Hearing, dated Sept. 6, 1974, at 256.)

Another voluntariness hearing was held concerning petitioner's statement directly to the police officer. The officer who received this statement testified that:

The statement occurred at approximately 5:30 p.m. on the day of the shooting incident -- as will be shown later, the shooting incident occurred at approximately 12:30 p.m., or 5 hours before the statement was made (R.T., Voluntariness Hearing, dated Sept. 12, 1974, at 404); petitioner was advised of his constitutional rights just before the statement was made (id. at 407); petitioner indicated that he wanted to speak with his attorney (a name was

given) before answering any questions, but there was no request for a telephone call (id. at 409-10); the officer did not ask any questions -- thus, petitioner was not given a chance to contact the named attorney at that time (id. at 410-11); however, petitioner made this statement:

> I think this thing should be considered self-defense. That dude knocked me down twice. When I got up I told him not to do it again. I got my gun and blew his fuckin' head off. God help me. That is what I done. I got my gun and blew his fuckin' head off.

(id. at 411); and lastly, petitioner appeared to understand what was going on just before, during and just after this statement (id. at 417).

During the second competency hearing to determine petitioner's ability to stand trial, Doctor Hoogerbeets testified that he examined appellant on September "19," 1974 (should be the 18th according to later trial testimony). (R.T., Second

Competency Hearing, dated Sept. 25, 1974, at 516.) The examination consisted of an hour interview. (Id. at 517.) During the interview, petitioner gave a detailed statement about the facts surrounding the homicide, less 2 minutes of alleged memory loss. (Id. at 520.)

At trial, Mr. Larson indicated that the shooting incident occurred at approximately 12:30 p.m. (R.T., Trial, dated Nov. 7, 1974, at 676-78.) Petitioner, at the time of the shooting incident, appeared to know his surroundings. (Id. at 676.)

Mr. Vogler agreed that the instant offense occurred at approximtely 12:30 p.m. (R.T., Trial, dated Nov. 8, 1974, at 865 and 869.) Mr. Vogler gave this account of the shooting incident:

> We sit here talking, me and Loser (Mr. Siegfred, one of the next two witnesses at trial), sit here talking and Bobby (petitioner)

> came around between the van and walked around Danny Clay (the victim) and tapped him on the shoulder and said a couple of words and had a shotgun in his hand raised up, pointed at his nose and the hammer was cocked. I stepped back trying to get behind Bobby and we was right next to the wrecker and then lit off with the shotgun.

(id. at 367) or

> He (petitioner) just walked around him (the victim) and tapped him or reached for him with his left hand and then Danny turned around and then Bobby just raised the shotgun, pointed it right up to his nose and then hesitated for a tenth of a second or so and then squeezed off. He hesitated enough so that I tried to get behind him and the wrecker.

(Id. at 871-72.)

Mr. Vogler added to this account indicating that: The victim, at the time of the shooting, did not have his arms raised (id. at 868); petitioner, at the time of the shooting, was not stumbling (id. at 870); petitioner only looked at the victim (id. at 871); the victim said

nothing to petitioner (id. at 872); the victim was shot while holding a bottle in one hand and nothing in the other (id. at 873), and petitioner began his fatal advance with a cocked shotgun (id. at 875).

Mr. Siegfred, another eyewitness to the homicide, related the events just prior to the shooting and corroborated Mr. Vogler's account of the shooting. There was a "scuffle" between petitioner and the victim. (R.T., Trial, dated Nov. 13, 1974, at 1095.) Thereafter, petitioner was placed in a van and, about 5 minutes later, the fatal advance began. (Id. at 1101 and 1109.) Mr. Siegfred gave this account of the shooting incident:

> As I was getting in (the van), about half turn, I heard the gun go off. I seen about that much, but I didn't see it until I was turning. About that time it was off.

(Id. at 1122.) Mr. Siegfred added to this account indicating that: The victim was

holding a bottle in one hand and nothing in the other (id.); the victim did not raise his arms (id. at 1123); the victim did not say anything to petitioner (id.); just before squeezing the trigger, petitioner said: "Don't fuck with me any more, mother-fucker." (id. at 1124); and just after squeezing the trigger, petitioner stood over the fallen body holding the shotgun (id. at 1125). The nurse who observed petitioner just after his apprehension on the day of the shooting incident indicated that petitioner was cooperative and aware of his surroundings. (R.T., Trial, dated Nov. 14, 1974, at 1421 and 142.) The girl friend related petitioner's telephonic statement. (R.T., Trial, dated Nov. 15, 1974, at 1477.) A police officer who also observed petitioner just after his apprehension on the day of the shooting

incident indicated that petitioner was "moderately" aware of his surroundings. (Id. at 1557 and 1567.) The police officer who overheard petitioner's telephonic statement related that statement. [R.T., Trial, dated Nov. 19, "1975" (should be 1974), at 105.] This officer also repeated his voluntariness hearing testimony regarding petitioner's degree of intoxication on the day of the shooting (id. at 98-104), and concluded petitioner was "aware of what was going on" and "not out of control." (Id. at 109.) The police officer who directly received petitioner's statement related that statement. (Id. at 145-A.) This officer also repeated his voluntariness hearing testimony regarding petitioner's degree of intoxication on the day of the shooting (id. at 143-45) and concluded petitioner "knew where he was, where he

had been, what was going on around him, what was requested of him." (Id. at 149.) The probation officer related petitioner's statement. (Id. at 183-84.) Doctor Gurland was called to the witness stand as a defense witness. [R.T., Trial, dated Nov. 20, "1975" (should be 1974), at 130.] He saw petitioner on March 7, 1974, for one hour and on September 17, 1974, for one hour. (Id. at 135-36.) His opinion of petitioner's sanity at the time of the offense was based on the March 7, 1974, interview only. (Id. at 139.) Defense counsel had this doctor relate petitioner's statement of the shooting incident which was made to the doctor during the interview. (Id. at 139-40.) The doctor concluded petitioner was legally insane at the time of the shooting. (R.T., Trial, dated Nov. 22, 1974, at 1751-53.) Finally, the doctor

indicated that petitioner's "not overly detailed" statement of the shooting incident was sufficient to form the opinion of legal insanity. (Id. at 1807, 1810-11 and 1833.)

On rebuttal, for purposes of having a medical expert know of a couple of petitioner's prior bad acts, two police officers testified about an armed robbery with a cigarette lighter that looked like a gun and an obstructing justice episode with an assault on a police officer -- the prosecutor sought this testimony only as foundation for an exhibit (petitioner's statement concerning the armed robbery); however, defense counsel went into specifics of the armed robbery and the prosecutor followed suit with respect to the obstructing justice episode. (R.T., Trial, dated Nov. 26, 1974, at 1861-73, 1879-1900 and 1919.)

Doctor Clymer saw petitioner on February 28, 1974, for 1 hour. (Id. at 1904.) His opinion of petitioner's sanity at the time of the offense was based solely upon this interview. (Id. at 1908-09.) The doctor, without objection, related petitioner's statement of the shooting incident, which was made to the doctor during the interview. (Id. at 1921.) The doctor concluded petitioner was legally sane at the time of the shooting. (Id. at 1924.)

Doctor Hoogerbeets was to be the next rebuttal medical expert, but petitioner objected -- the trial court allowed the doctor to testify because the testimony was relevant; there was no surprise and the objection was untimely. (R.T., Trial, dated Nov. 27, 1974, at 2061.) Doctor Hoogerbeets saw petitioner on September 18, 1974, for 1 hour. (Id. at

2064-65.) This doctor based his opinion upon the interview and other materials including numerous hypothetical facts in evidence, which did not alter the opinion and which were supplied by the prosecutor based upon the testimony of the other two medical experts and by defense counsel based upon the other experts' testimony and his interview with the doctor. (Id. at 2082, 2087-2100 and 2103-05.) This doctor concluded petitioner was legally sane at the time of the shooting. (Id. at 2079.) Additionally, this doctor related, without specific objection, petitioner's statement of the shooting incident, which was made to the doctor during the interview. (Id. at 2075-77.)

Lastly, Doctor Hoogerbeets indicated that his interview for competency to stand trial provided him with the necessary information to offer an opinion on sanity

at the time of the offense. (R.T., Trial, dated Nov. 29, 1974, at 34-35.)

ARGUMENT

I

THE ADMISSION IN EVIDENCE OF THE PROBATION OFFICER'S TESTIMONY REGARDING PETITIONER'S STATEMENT CONCERNING THE INSTANT OFFENSE WAS HARMLESS ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

The decisions of the Ninth Circuit Court of Appeals, the Arizona District Court, and the Arizona Supreme Court comport with all decisions from this Court interpreting the constitutional rights of persons accused of crime, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. None of the issues presented by the instant writ warrant a grant of certiorari. Some of the issues presented are not properly before this Court. Finally, this introductory paragraph will not be

repeated before each argument, but is incorporated thereto by reference.

Petitioner first contends that the admission of the probation officer's testimony was too damaging to be properly deemed harmless. Respondents submit that, compared to the other trial evidence, the challenged testimony is rendered wholly innocuous.

Through the probation officer, these actions by petitioner were referenced: he went to the truck, obtained the weapon, approached the victim, and shot the victim. See Petitioner's Writ, at 15. The two eyewitnesses (Mr. Vogler and Mr. Siegfred) related these same actions. The statements to the police and the girl friend also referenced these actions. The three previous court decisions properly held the challenged testimony to be cumulative. The error was harmless.

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

However, petitioner also contends that errors of this nature cannot be harmless regardless of other evidence. Respondents posit that this contention is not properly before this Court. The impossibility of harmless error issue, contrary to petitioner's representation, has not been raised or ruled upon by the prior three courts involved in this matter. See the three court decisions contained in Petitioner's Writ (the Arizona District Court's footnote should be noted in particular). This Court should not address this sub-issue.

ARGUMENT

II

THE ADMISSION IN EVIDENCE OF A MENTAL HEALTH EXPERT'S TESTIMONY REGARDING PETITIONER'S STATEMENT CONCERNING THE INSTANT OFFENSE WAS HARMLESS ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

Petitioner claims that the admission of the mental health expert's testimony was also too prejudicial to be considered harmless error. Again, respondents submit that, when placed next to other trial evidence, the challenged testimony becomes totally harmless.

The mental health expert related to the jury even less of petitioner's actions than had the probation officer. Only the shot was related. (It should be noted that petitioner's recollection was crucial to the insanity defense; thus, petitioner opened certain doors by having his expert testify about a nonspecific statement of

petitioner -- the insanity defense also required no objection when the challenged testimony was given.) Clearly, the testimony of the two eyewitnesses and the statements to the police and the girl friend thoroughly covered all aspects of the shot. The three previous court decisions properly held the challenged testimony to be cumulative. The error was harmless. Chapman v. California, supra.

Once again, petitioner raises the specter of impossibility of harmless error. Again, respondents rely upon improper posture. The impossibility of harmless error issue is not properly before this Court. Contrary to petitioner's assertion, it has not been raised or ruled upon by the prior three courts involved in this matter. See the three court decisions contained in

Petitioner's Writ (the Arizona District Court's footnote should be noted in particular). This Court should not address this sub-issue.

ARGUMENT

III

THE ADMISSION IN EVIDENCE OF ANOTHER MENTAL HEALTH EXPERT'S TESTIMONY CONCERNING PETITIONER'S SANITY AT THE TIME OF THE INSTANT OFFENSE WAS NOT ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

Petitioner further contends that it was error for a mental health expert, who examined petitioner for competency to stand trial, to testify about petitioner's sanity at the time of the offense. Assuming a federal constitutional question is presented, there was no error.

Petitioner makes no claim that there was no basis for the opinion. Indeed, there was such a basis. The necessary foundation was readily provided because

the degree of petitioner's recollection was the central issue with respect to competency to stand trial and sanity at the time of the offense. As pointed out in Birdsall v. United States, 346 F.2d 775 (5th Cir. 1965), many a discovery occurs in the search for something else. The challenged testimony came as no surprise to petitioner (there was a pretrial interview). There was no error.

ARGUMENT

IV

THE ADMISSION OF PETITIONER'S STATEMENTS TO THE POLICE AND THE GIRL FRIEND WAS NOT ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

Petitioner further claims that his statements were the product of his intoxication solely. While the trial evidence displayed a degree of intoxication, three courts have reviewed that evidence and concluded that the

degree of intoxication was not sufficient to render the statements involuntary. Respondents submit that the facts show a series of spontaneous declarations that were the product of a rational intellect and free will. See Townsend v. Sain, 372 U.S. 293, 83 s.Ct. 745, 9 L.Ed.2d 770 (1963). Since the statements were not the product of intoxication, there was no error.

ARGUMENT

V

THERE WAS SUFFICIENT EVIDENCE OF GUILT; THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI.

Petitioner also contends that the evidence was not sufficient. Respondents submit that there was sufficient evidence; however, a preliminary matter must be dealt with first. Petitioner weaves several challenges to the instructions into this issue. These challenges are not

properly before this Court; they have not been raised or ruled upon by the prior three courts. See the three court decisions contained in Petitioner's Writ. This Court should not address these sub-issues. Moreover, even assuming that a federal constitutional question is presented, the challenged instructions have passed constitutional muster. See Bustamante v. Cardwell, 497 F.2d 556 (9th Cir. 1974).

With respect to the sufficiency of the evidence, the testimony of the two eyewitnesses and petitioner's statements to the police and the girl friend permitted the jury to resolve all the issues at trial into a finding of first degree murder. The facts allowed a rational fact finder to find the presence of malice aforethought (express), the presence of premeditation (not

instantaneous), the lack of provocation (but the presence of a cooling off period), the lack of self-defense, the lack of insanity, and the lack of intoxication (to remove malice). The evidence was more than sufficient.

ARGUMENT

VI

THE PREMEDITATION INSTRUCTION WAS PROPER; THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI.

Petitioner also claims, as a final contention, that the premeditation instruction is prosecution slanted. The instruction was proper. Even assuming a federal constitutional question, the instruction has passed constitutional muster. See Bustamante v. Cardwell, supra. Two final points: (1) viewing the instructions as a whole places the challenged instruction into the proper context, and (2) petitioner's

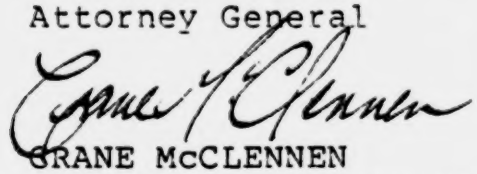
premeditation was far from instantaneous -- he went to his truck, obtained his weapon, approached his victim, and then pulled the trigger.

CONCLUSION

Since the resolution of those issues properly before this Court conforms with the existing law of the land, there are no proper grounds for a grant of certiorari. For the foregoing reasons, respondents respectfully request this Court's denial of the requested grant of certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



CRANE McCLENNEN
Assistant Attorney General

Attorneys for RESPONDENTS

Supreme Court, U. S.
FILED
DEC 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-690

BOBBY REED MAGBY,

Petitioner,

vs.

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Respondent.

PETITION FOR

WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

STANTON BLOOM
32 North Stone, Suite 610
Tucson, Arizona 85701
Attorney for Petitioner

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Tucson, Arizona 85701
Attorney for Petitioner

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ARGUMENT I

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT AN APPELLANT'S IN-CUSTODY STATEMENTS MADE TO A PROBATION OFFICER WITHOUT MIRANDA WARNINGS WERE HARMLESS ERROR, AND THEREBY DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVED PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent in his reply has briefly addressed the legal arguments and has simply relied upon Lower Court rulings. However, it is evident Respondent during the entire brief has devoted much time and effort to a discussion of the facts, because the Law is clearly opposed to his position. Petitioner has, in earlier petitions and briefs, emphasized the facts but spent more time on the Law for purposes of this Petition. Petitioner welcomes the opportunity now to respond to the factual, fictional atmosphere portrayed by the Respondent.

Respondent argues Petitioner's statements to the Probation Officer were innocuous. If they were

so innocuous, why did the Prosecutor insist on the statements to be introduced in his case-in-chief? Why is the only statement from the Petitioner that he remembered everything that happened and then supplied details innocuous when the Petitioner, through State's witnesses, raised the "defense" of intoxication, that he did not know what was happening? Why are Petitioner's statements innocuous when he states he knew what he was doing and was unable to properly present a factual self-defense defense when the Petitioner's defenses were also insanity and self-defense, as established by State's witnesses alone? More importantly, other State's witnesses that briefly touched on such statements did not testify to the words of the Petitioner as they touched upon his defenses. Can it be any clearer why the Prosecutor knew he needed the testimony and why such evidence ever introduced before the defense ever presented its case must be declared not to be harmless error?

Significantly, Respondent has attempted to skirt the issue of voluntariness and asked this Court not to rule on this most vital issue. This case is old enough now, and if there is reversible constitutional error, it ought to be dealt with now by this Court, particularly when the question is so ripe for decision.

The Probation Officer Burch stated he wanted to gather information to determine if Petitioner's

probation should be revoked. (RT-V3-483,487). Most importantly, Probation Officer Burch testified on a pre-trial motion "that he considered his position one of an accusatory position and once the Petitioner had been arrested, he considered himself an adversary against the Petitioner." (RT-V3-494,499). Against this background, the Probation Officer candidly admitted that he used his "good rapport with the Petitioner to gain his confidence", and thereby secure the statement later used at trial by the Prosecutor against the Petitioner. (RT-V3-499,500). It is precisely the uniqueness of the confidential relationship that allowed for the elicitation of the statement. This, coupled with the Petitioner's fear of not cooperating, and the possible repercussions listed in the opening petition, clearly called for the Petitioner to make an involuntary statement. Petitioner requests this Honorable Court hold his statements made to the Probation Officer 2 days after his arrest to be made in an involuntary manner and, therefore, never harmless error, and reverse his conviction.

ARGUMENT II

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT PETITIONER'S STATEMENT TO PSYCHIATRISTS IN VIOLATION OF THE ARIZONA RULES OF CRIMINAL

PROCEDURE WERE HARMLESS ERROR, AND THEREBY DEPRIVED PETITIONER OF DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVED PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF IN ACCORDANCE WITH THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Again Respondent states the statements made to the psychiatrists were cumulative harmless error. In fact, the Prosecutor had learned of much of his information used at trial under the guise he would not use this information with every psychiatric witness, knowing full well by his own admission and avowal that such statements were inadmissible at trial. (C.H. 89-90). (RT-V3-583). In fact, on a pre-trial motion, when the Prosecutor attempted to elicit the confidential information complained of from Dr. Hoogerbeets, the objection was sustained. (RT-V3-520). Further, prejudice occurred when the Prosecutor used the inadmissible statements of the Probation Officer to question the psychiatrists.

The relationship of psychiatrist and patient by its very connotation must produce the openness and trust of the patient to elicit any meaning, observation and commentary. This is particularly true when the Petitioner-Examinee-Patient is

ordered by the Court to speak to the doctors lest he be penalized for not doing so and lose his defense and/or witness and subject himself to further incarceration for contempt of Court. Arizona Rules of Criminal Procedure, Rule 11.2. Petitioner requests that this Court hold his statements to be reversible error as a violation of due process and as involuntary statements violating his Fifth Amendment rights to the United States Constitution.

ARGUMENT III

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT A PSYCHIATRIST APPOINTED TO EXAMINE PETITIONER SOLELY FOR COMPETENCY COULD TESTIFY AT TRIAL AS TO THE SANITY OF PETITIONER AT THE TIME OF THE OFFENSE, AND THEREBY DEPRIVED PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent is incorrect when he stated "Petitioner makes no claim that there was no basis for the opinion." On P.26 of the opening petition, Petitioner states "Petitioner also claims the psychiatrists had no basis to form an opinion...."

Petitioner does not feel that the psychiatrist, Dr. Hoogerbeets, was in a proper position to make a determination of the Petitioner's sanity at the time of the offense.

The psychiatrists (not Dr. Hoogerbeets) at the time of the first competency hearing and mental examination were specifically appointed to examine the Petitioner for sanity. (2-15-74, P.13) Dr. Hoogerbeets was not requested to conduct such an examination, and, in fact, was specifically instructed not to conduct an examination on the sanity of the Petitioner. The Trial Court stated on a pre-trial motion, when the Prosecutor attempted to bring out evidence on the issue of sanity, "You were not asked to delve into that and no one intended that be gone into." (RT-V3-559). The fact the Petitioner's trial counsel was able to pretrial interview Dr. Hoogerbeets does not have any bearing or relevance on the propriety of Dr. Hoogerbeets examination for sanity and his testimony thereto. The interview does not save an illegal procedural and substantive act. The fact that the defense knows Dr. Hoogerbeets did something improper and is going to try and compound the impropriety by testimony at trial does not somehow cure any error. The Doctor's examination testimony and subsequent opinion cannot be based or predicated on an issue that was not the reason for his examination of the Petitioner and for which

the Petitioner was unprepared and unaware. Petitioner humbly suggests that these statements to the psychiatrists were admitted into evidence as a violation of the Petitioner's rights to due process of Law and not to incriminate himself in accordance with the Fourteenth Amendment and Fifth Amendment of the United States Constitution.

ARGUMENT IV

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING PETITIONER'S CONFESSIONS AND STATEMENTS TO POLICE OFFICERS AND LAY WITNESSES WERE KNOWINGLY AND VOLUNTARILY MADE, EVEN THOUGH PETITIONER WAS HIGHLY INTOXICATED, AND THEREBY DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The facts show the statements to the police and his girlfriend were far from being spontaneous declarations made with rational intellect and free will, but on the contrary, were involuntary statements made while the Petitioner was highly intoxicated.

Petitioner had been drinking for months continuously up to the day of the shooting, but prior to the shooting, Petitioner had been drinking

heavily without dispute. (RT-V6-1064). Larsen, a State's witness and friend of the deceased, stated Petitioner, in the morning shortly before the shooting, was "under the influence", "had a slur in his voice", "was stumbling", and "was plastered". (RT-V1-93,94,119). Larsen further stated Petitioner "was pretty well plastered", "staggering quite a bit", "slurring his words" and "was on the verge of passing out". (RT-V4-674,675). Earlier, when Larsen had tasted the contents of the jug Petitioner was drinking from, he stated the substance therein was "potent stuff", and it was "mixed hard". (RT-V4-715,716). Larsen, in addition, stated right before the shooting, but right after the deceased and the Petitioner had had a fight, Petitioner was "pretty well gone drunk", "pretty wiped-out", (RT-V4-731) and "looked drunk" (RT-V4-733,739,741) and "was drunk" (RT-V4-674,770).

The next witness was Siegfried, who was a friend of Petitioner's. Larsen and Siegfried had both witnessed the fight between the deceased and the Petitioner shortly before the shooting and saw Petitioner on the ground in an unconscious state. (RT-V1-86, RT-V4-666,725, RT-V6-1083,1084,1183, 1184-1187). Siegfried testified the Petitioner before the shooting "was out of it at the time of the scuffle," (RT-V6-1095) and "was drunk". (RT-V6-1094,1180). Siegfried testified that Petitioner had a blank look on his face and was unable to stand

before the shooting (RT-V6-1133,1257). Further, he stated Petitioner had trouble talking and was barely understandable and at the time of the shooting was in a dazed condition acting real strange. (RT-V6-1206,1273). Ralph Vogler, an eye-witness to the shooting who arrived after the fight but a minute or two before the shooting stated Petitioner was stumbling around (RT-V5-885) and he could hardly walk (RT-V5-895,898). Vogler thought the Petitioner was "high on something" (RT-V5-928) or that he "was loaded." (RT-V5-929).

A mailman saw the Petitioner shortly after the shooting stumbling out in the desert where he appeared physically exhausted or possibly intoxicated. (RT-V7-1403,1407). Petitioner passed out in a nearby truck where he was found by the owner slumped over the seat. The police found Petitioner in a similar position and then transported him back to the scene for identificaiton. Petitioner was slumped over in the squad car and was exhibited to the witnesses by having his head pulled up by his hair by the police. (RT-V1-112, RT-V4-682).

Petitioner was then transported to the hospital to treat his physical condition. The doctor that examined Petitioner stated he noticed a strong odor of alcohol about him and upon testing found "no reflexes were exhibited at all." The nurse who tended the Petitioner at the hospital

Emergency Room, testified Petitioner was staggering, had a blank stare on his face, and looked like he had been out in the desert a few days. She further stated that he was "spaced-out", "bewildered, wild-eyed, glassy-eyed, and his eyes were rolling back and forth." (RT-V8-1433,1440,1454). In addition, she stated Petitioner needed assistance to get on the stretcher and to get his clothes off for the doctor's examination. (RT-V8-1432,1433).

Petitioner's girlfriend, whom he spoke to on the telephone after he was taken to the jail stated the Petitioner did not sound like he was into the conversation and sounded out of breath. (RT-V8-1489)(RT-V2-257,260). At the time of this telephone conversation, the trial Judge referred to Petitioner's intoxication. (RT-V1-200).

Many police officers saw the Petitioner after the shooting. Deputy Godfrey saw Petitioner 1 1/2 hours after the shooting and said he was "under the influence of intoxicating beverages, staggering a bit, had slurred speech, smelled of alcohol, had bloodshot red eyes, dusty clothes, and was pretty messed-up." (RT-V8-1563,1569,1575,1584). Sergeant Jett stated Petitioner was under the influence of alchoholic beverages but would be unable to give an opinion on the degree of intoxication. (RT-V1-163). Sergeant Tucker, however, stated Petitioner, several hours after being arrested, was still definitely under the influence of alcohol and

quite intoxicated. (RT-11-19-74, pp.148-149). Sergeant Tucker related that Petitioner did not speak clearly, swayed when he walked, talked slowly and slurred his words, had red glassy eyes, a very cocky mood and was just sort of wandering around swinging his arms and talking very loudly. (RT-V3-424,425,433). The male police nurse that drew Petitioner's blood at the jail indicated Petitioner was drunk, had bloodshot eyes, was staggering, a little incoherent and, in his opinion, the Petitioner "was drunk", "he looked drunk and he just looked drunk to [him], that's all". (RT-V9-1609,1610).

The Prosecutor, in his closing argument, told the Jury Petitioner "had been drinking a great deal", "was drunk as anything" and was "pretty drunk" (RT-V4-614-617) and pretty wiped-out. (RT-V4-731). On a motion for a new trial, the Trial Judge reiterated his early feeling that the Petitioner had been "highly intoxicated". (Motion - New Trial, p.20).

It is highly difficult to perceive that after the Petitioner had been beaten at the hands and feet of the deceased, beaten by the police at the time of his arrest, taken to the Emergency Room at a local hospital and was in the drunken state as attested to by every single witness produced by the Prosecution, including those testifying to the Petitioner's blood alcohol (.36-.40), that

Petitioner's statements can be held to be anything but involuntary and not made with rational intellect and free will.

ARGUMENT V

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THE EVIDENCE SUPPORTED CONVICTIONS FOR FIRST AND SECOND DEGREE MURDER, AND DEPRIVED APPELLANT OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. MALICE.

Petitioner reasserts his comments in his opening petition.

B. INTOXICATION--SELF-DEFENSE.

It is clear that the deceased kicked Petitioner in the ribs after knocking him to the ground and threatened "he was going to tear his little ass apart." (RT-V4-724). Petitioner was knocked down pretty good (RT-V4-727) and was unable to get up under his own power. The deceased was well-developed, big, strong, muscular, tough and a karate expert. (RT-V4-702, RT-V6-1189,1202). The

deceased had been in the penitentiary (RT-V4-702), and had a reputation for turbulence and violence, and was considered a fighter and pretty tough, as corroborated by the Pima County Sheriff's Office (RT-V7-1355) and several lay witnesses. (RT-V4-703,704)(RT-V6-1191). These facts, coupled with the intoxication argument of ARGUMENT IV, truly support the basis of a conviction other than first-degree murder. Petitioner asks this Court to properly and rationally review the facts and asserts this Court can come to no other logical conclusion. Mr. Justice Harlan stated in In Re Winship, 397 U.S. 372, 90 S.Ct. 1068, 25 L.Ed.2d. 368 (1970)

> "It is far worse to sentence one guilty of only manslaughter as a murderer, than to sentence a murderer for the lesser crime of manslaughter."

C. MITIGATION INSTRUCTION

1. Lack of Malice.
2. Shift of Burden of Proof.

The instructions complained of and likened to Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d. 508 (1975),have not passed Constitutional muster and could never do so in their present condition.

ARGUMENT VI

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH

CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT AN INSTRUCTION STATING, "THERE IS NO PRESCRIBED PERIOD OF TIME WHICH MUST ELAPSE BETWEEN THE FORMATION OF THE INTENT TO KILL AND THE ACT OF KILLING" WAS PROPER, AND DEPRIVED THE PETITIONER OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATED HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THF UNITED STATES CONSTITUTION.

In viewing the complained of instruction, one must consider what the Jury could possibly conceive from the instruction that would misguide them and find facts not in accordance with the Law. In the case at bar, if the Jury believed that Petitioner had left the van and gone out to the deceased to only scare him, as was testified by Dr. Hoogerbeets, a psychiatrist-witness for the State (RT-V11-2122) and then when the deceased, according to Vogler, a State's witness, (RT-V5-914), walked towards Petitioner, and Petitioner formed the specific intent to kill the deceased at approximately the same time he fired the gun, the Petitioner would then, under the complained of instruction, be guilty of first-degree murder. The improper instantaneous-successive thought theory would prevail, and, therefore, every killing

would automatically be first-degree murder. This instruction is clearly bad law and must be struck down before more Petitioners are convicted of first-degree murder when their crimes are of a considerably lesser degree as particularly in the case at bar. Petitioner requests this Honorable Court to reverse his case because the Jury was deprived of proper judicial guidance and due process of Law when it was given the complained of instruction, or in the alternative, reduce the conviction to a crime palatable with the evidence.

Stanton Bloom

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-690

BOBBY REED MAGBY,

Petitioner,

vs.

JOHN MORAN, Director, Arizona State Department of Corrections, HAROLD CARDWELL, Warden, Arizona State Prison, State of Arizona,

Respondents.

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANTON BLOOM, being first duly sworn deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of the following documents on the Attorney General, State of Arizona, 200 State Capital Building, Phoenix, Arizona 85007, and has forwarded by mail, a copy of the following documents to the Solicitor General, Department of Justice, Washington, D.C. on this 17th day of December, 1979:

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REPLY BRIEF

Stanton Bloom
STANTON BLOOM

SUBSCRIBED AND SWORN to before me this 17th day of December, 1979, by STANTON BLOOM.

Linda D. Kovarr
NOTARY PUBLIC

My commission expires:

My Commission Expires Nov. 15, 1983